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THE ORDERS

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# COURT OF CHANCERY

For Upper Canada,

AND OF THE

## COURT OF ERROR AND APPEAL;

WITH THE

PROVINCIAL STATUTES RELATING TO THE PRACTICE  
OF THESE COURTS, NOTES AND FORMS.

BY

THOMAS WARDLAW TAYLOR, M.A.,

OF OSGOODS HALL, ESQUIRE, BARRISTER-AT-LAW.

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## PREFACE TO THE SECOND EDITION.

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SINCE 1860, when the former edition of the "Chancery Orders" was published, important changes have been made in the practice of the Court, both by the promulgation of numerous additional Orders, and the repeal of some then in force.

In the present edition will be found not merely all the Orders which at present govern the practice of the Court, but also the Chancery Act as contained in the Consolidated Statutes of Upper Canada.

It has also been deemed advisable to add to these, such Orders of the Court of Error and Appeal as relate to appeals from the Court of Chancery. The remaining Orders, which regulate the practice on appeals from the Courts of Common Law, have been omitted, because many of them—though unrepealed—have been rendered obsolete by later statutory enactments.

In order to make the work more complete, those portions of the Consolidated Statutes relating to appeals from the County Courts and Surrogate Courts have been added, together with portions of the various acts respecting witnesses and evidence, limitations of actions in equity, the custody of infants, and the property of religious institutions.

In the preparation of the notes on the various Orders, great difficulty has been experienced, owing to the dearth of reported decisions on points of practice arising in the Court in this Province. The practice cases reported in the earlier volumes of Mr. Grant's Reports, are many of them inapplicable to the present state of the practice; but it is believed that few of the cases bearing on the Orders and Practice now in force have been omitted. A few manuscript cases, carefully selected, have been given, but only after thorough examination of their authenticity and correctness. Care has been taken to collect as many as possible of the English practice decisions which can be relied on as authorities and guides in this Province.

Conciseness and the avoidance of needless repetition, have been kept in view as much as possible in the compilation of this edition. In endeavouring to carry out these views, the leading cases only on the several points have been noted; when many cases are referred to, the practitioner often loses much valuable time in searching for those really important. Confirmatory cases will be found mentioned in the report on reference to the case cited.

The want of Forms in common use having been felt, a selection has been given, which will be found useful; and will serve, to some extent at least, as guides in those special cases which so frequently occur in Chancery.

Wherever an Order is a verbatim reprint of an English Order, or section of Act of Parliament, reference has been made thereto in italics at the end of it. In many cases a great similarity occurs, but from the fear of misleading the practitioner who may not have a copy of the

English Consolidated Orders, or be unacquainted with the practice followed by the High Court of Chancery (in many points essentially different from ours), such reference has been omitted.

The author has to express his great indebtedness to the numerous friends from whom he has received valuable assistance in his labours. He would especially tender his warmest thanks to William Proudfoot, Esquire, of Hamilton, for the exhaustive note upon Section 13 of Order XLII. respecting the powers of the Master. From his experience as Master at Hamilton, and acknowledged standing at the Equity Bar, Mr. Proudfoot was well qualified to set out the principles which govern the practice of the Court on this subject.

And further, the author must, in this place, mention his obligations to the judicious and pains-taking exertions of Mr. G. M. Rae, to whom the book is indebted for the index and table of cases, and also for many of the forms and practical directions, which called for no emendation at the author's hand, and which will prove, it is hoped, not the least important part of this edition of the Orders.

The first edition of this work having been out of print, this book has for a long time been in preparation, but the publication of it was delayed from the belief that more extensive changes in practice would have been effected by the Orders issued in January, than have taken place.

In conclusion, the author has to regret that since the following pages were first put into the printer's hands, from unforeseen and painful circumstances of bereavement, the publication of them has been delayed.

He can only thank the subscribers for their patience, and trust that the book, notwithstanding its many shortcomings, of which he is fully conscious, will in some part at least meet with their approbation.

Toronto, May 1st, 1863.

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# ERRATA AND ADDENDA.

- Page 24, Arner v. McKenny, since reported in 9 Grant, 226.  
 " 25, Tiffany v. Thomson, since reported in 9 Grant, 244.  
 " 90, for Chapham, read Clapham.  
 " 98, for Wickson, read Dickson.  
 " 124, Simpson v. Ottawa Rail. Co., Cham. R. 99. A receiver, though an officer of the court, stands in the position of trustee to all interested in the estate or fund; therefore, in making the appointment, the court will endeavour to select a person unexceptionable to all parties, not only on the score of fitness and competency, but also as regards the feelings of friendship and dislike between the person proposed and those with whom he, in the discharge of his duties, will be likely to be brought into frequent communication.  
 " 126, for Biny, read Bing.  
 " 157, for Jr., read p.  
 " 239, *Re* Freeman is not reported in 8 Grant; but in Grant's Error and Appeal Reports, as yet unpublished.  
 " 290, for the Court of Queen's Bench, read the judges of the Court of Queen's Bench in chambers.

# CHANCERY ACT.

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## CON. STAT. U. C., CAP. XII.—AN ACT RESPECTING THE COURT OF CHANCERY.

**H**ER MAJESTY, by and with the advice and consent of the Legislative Council and Assembly of Canada, enacts as follows :

I. The Court of Chancery now existing in Upper Canada is hereby continued, and shall continue to be called the Court of Chancery for Upper Canada. 7 W. 4, c. 2, s. 1.

II. The Governor in Council may, from time to time, determine and declare the seal to be used in the Court, and by which its judgments and proceedings shall be certified and authenticated. 7 W. 4, c. 2, s. 18.

III. The Court shall be presided over by a Chief Judge, to be called the Chancellor of Upper Canada, and two additional Judges, to be called Vice-Chancellors. 12 V. c. 64, s. 1.

IV. Her Majesty may from time to time, as vacancies occur, appoint, by Letters Patent under the Great Seal of this Province, one person, being a Barrister at Law of not less than ten years' standing at the Bar of Upper



Canada, to be Chancellor, and two persons, being Barristers of not less than ten years' standing at the said Bar, to be Vice-Chancellors; and the Chancellor of Upper Canada shall have rank and precedence next after the Chief Justice of Upper Canada; and the Vice-Chancellors and the Puisné Judges of the Superior Courts of Common Law shall have rank and precedence as between themselves according to seniority of appointment to their respective Offices. 12 V. c. 64, s. 2.

V. The Judges shall hold their offices during good behaviour; but the Governor in Council may remove any of them upon the address of the two Houses of the Parliament of the Province; and in case a Judge so removed thinks himself aggrieved thereby, he may within six months appeal to Her Majesty in Her Privy Council, and in that case such amotion shall not be final until the appeal has been determined by Her Majesty in Her Privy Council. 12 V. c. 64, s. 3.

VI. In respect to the salaries of the Judges, there shall, out of the Consolidated Revenue Fund of the Province, (after paying or reserving sufficient to pay all such sums as were before the thirtieth of May, one thousand eight hundred and forty-nine, directed by any Act of the Parliament of this Province, to be paid out of the same, but with preference to all other payments thereafter charged upon the same) be paid to the Chancellor, five thousand dollars per annum, and to each of the other Judges, four thousand dollars per annum; and these sums shall be paid quarterly, free from all taxes and deductions, on the first day of January, the first day of April, the first day of July, and the first day of October, by equal portions, the first payment to be made on the first of those days which occurs after the appointment of the Judge entitled to receive the same; and in case any

of the Judges be removed from office or die or resign office, such Judge or his executor or administrator shall be entitled to receive such proportionable part of the salary as accrued during the time that he executed the office subsequent to the last payment, and the successor to the office vacated by such Judge shall receive such portion of the salary as accrues from the day of his appointment. 12 V. c. 64, s. 4.

VII. In case any Judge of the said Court of Chancery has continued in the office of a Judge of one or more of the Superior Courts of Law or Equity in Upper Canada, for fifteen years, or becomes afflicted with some permanent infirmity disabling him from the due execution of his office, and in case such Judge resigns his said office of Judge, Her Majesty may, by Letters Patent under the Great Seal of this Province, reciting such period of service or permanent infirmity, grant unto such Judge an annuity equal to two thirds of the salary annexed to the office of such Judge, to commence immediately after the period of his resignation and to continue thenceforth during his natural life; and such annuity shall be charged upon and be paid out of the Consolidated Revenue Fund of this Province, after paying or reserving sufficient to pay all such sums of money as by any Acts of the Parliament of this Province in force on the thirtieth day of May, one thousand eight hundred and forty-nine, have been directed to be paid thereout, but with preference to all other payments thereafter charged upon the same fund; and such annuity shall be paid quarterly, by equal portions on the first days of January, April, July and October, in each year, free from all taxes and deductions whatsoever; and the first quarterly payment, or a proportionate part thereof to be computed from the time of his resignation, shall be made on such of the said days as next happens after the resignation;

and the executors or administrators of the person to whom the annuity has been granted shall be paid such proportionate part of the same as accrued from the commencement, or the last quarterly payment thereof, as the case may be, to the day of his death. 12 V. c. 64, s. 5.

VIII. Every Judge shall, previous to executing the duties of his office, take the following oath, which oath shall be administered to the Chancellor before the Governor in Council, and to the Vice-Chancellors in open Court in presence of the Chancellor: 12 V. c. 64, s. 6.

" I , do solemnly and sincerely promise and swear, that I will duly and faithfully, and to the best of my skill and knowledge, execute the powers and trusts reposed in me, as Chancellor (or Vice-Chancellor). So help me God."

IX. The Governor in Council may, from time to time, under the Great Seal of the Province, appoint during pleasure, one Registrar, one Master in ordinary, one Accountant, and a Sergeant-at-Arms, to the Court; and these Officers shall, in addition to the duties usually performed by the like officers in England, be liable to perform any other duties assigned to them by the Court. 7 W. 4, c. 2, s. 9,—12 V. c. 64, s. 12.

X. The Registrar and Master in ordinary may each appoint one Clerk, subject to the approval of the Judges, and may with the like approval remove such Clerk at pleasure. 13, 14 V. c. 50, s. 3,—12 V. c. 64, s. 12.

XI. The Master in ordinary, Registrar, or Clerk so appointed, shall not take for his own benefit, directly or indirectly, any fee or emolument, save the salary to which he may be entitled by law; But the like sums

and fees heretofore payable and receivable in the Court shall continue to be payable and receivable by the like persons; and all the fees received by or on account of the Master and Registrar, shall form part of the Consolidated Revenue Fund of the Province. 12 V. c. 64, s. 13.

XII. The Master in ordinary and Registrar respectively shall, on the four quarterly days hereinbefore mentioned, render to the Minister of Finance a true Account in writing of all the fees received by or on account of his office, in such form and with such particulars as the Minister of Finance from time to time requires; and shall sign the account, and declare the truth thereof before one of the Judges of the Court; and shall, within ten days after rendering the account, pay over the amount of the fees to the Receiver General; and if default be made in such payment, the amount shall be deemed a specialty debt to Her Majesty. 12 V. c. 64, s. 14.

XIII. The Judges may, from time to time, under the Seal of the Court, appoint, and at their discretion remove, local Masters and Deputy Registrars (both of which offices may be held by one person,) in such places respectively out of Toronto, as the Judges may think expedient for the purpose of promoting as far as practicable the local administration of Justice; and the Judges may likewise in manner aforesaid, appoint and remove Commissioners for administering oaths and taking affidavits and depositions in the said Court with the powers formerly possessed by Masters Extraordinary and Examiners; And also an Usher to attend on the Court, and the respective Judges thereof, during the sittings of the Court and Judges respectively for the transaction of business, and to execute such process of the Court as may be

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directed to him. 13, 14 V. c. 50, s. 1,—20 V. c. 56, ss. 17, 19,—7 W. 4, c. 2, s. 10.

A bill of complaint may be filed either with the registrar, or in the office of a deputy registrar, at the option of the plaintiff, *Ord. 9, s. 2*; but all the subsequent pleadings must be filed in the same office as the bill, *Ord. 44, s. 2*.

The deputy masters and deputy registrars respectively are to perform the duties of their several offices in the same manner, and under the same regulations as the like duties are performed by the master and registrar respectively; and all orders, rules and regulations, in force respecting the master and registrar respectively, and respecting the regulations of their respective offices, are to be in force and applicable to the deputy masters and deputy registrars respectively, in relation to such duties as they are required to perform; and the like sums and fees payable to the master and registrar respectively, are to be payable to the deputy masters and deputy registrars respectively in relation to similar matters, *Ord. 44, s. 1*.

Where the bill is filed in an outer County, the deputy master may also hear and dispose of all applications in the progress of the suit, for the following purposes, viz:—to appoint guardians *ad litem* for infants,—for time to answer or demur,—for leave to amend before replication,—to postpone the examination of witnesses, or to allow further time for the production of evidence,—for security for costs, *Ibid, s. 4*.

All office copies of decrees to be served on parties, added in the masters office, may be certified by the deputy registrar, where the reference is made to, *Ord. 66*; deputy registrars are also required to transmit to the registrar at Toronto, quarterly, a list of all bills filed with them during the preceding quarter, *Ibid s. 2*. Certificates of the filing of bills, and certificates of decrees for registration, may also be given by deputy registrars, *Con. Stat. U. C., c. 12, ss. 64, 65*.

XIV. There shall be paid out of the Consolidated Revenue Fund of the Province, (after paying or reserving sufficient to pay all such sums as were directed by any Act of the Parliament of this Province before the Thirtieth day of May, one thousand eight hundred and forty-nine, to be paid thereout, but with preference to all payments thereafter charged upon the same) the yearly sums following as and for the salaries of the Master in ordinary, the Registrar and the Clerk of the Registrar, that is to say; to the Master, two thousand dollars; to the Registrar, one thousand six hundred dollars; and to

the Clerk, five hundred dollars; which sums shall be paid quarterly, free from all taxes and deductions, on the four quarterly days hereinbefore mentioned; but the payment to be made in each case on the first of the quarterly days which happens after the right thereto accrues, shall be a rateable proportion of a Quarter's Salary, according to the time then elapsed since the accrual of the right; and in case of a vacancy in the office of such Master, Registrar or Clerk, the person making the vacancy, his executors or administrators, shall be entitled to a proportional part of his salary according to the time elapsed between the vacancy and the last quarterly payment; and there shall also be paid out of the Consolidated Revenue Fund of the Province (after paying or reserving sufficient to pay all such sums as have been directed by any Act of the Parliament of this Province before the tenth day of August, one thousand eight hundred and fifty, to be paid out of the same, but with preference to all payments thereafter charged upon the same) the yearly sum of five hundred dollars, for the salary of the Clerk in the Master's Office. 12 V. c. 64, s. 12,—13, 14 V. c. 50 s. 3.

XV. The local Masters, the Deputy Registrars, and the Commissioners may retain to their own use all the fees of office which they respectively receive not belonging to any fee fund, and need not account to the Crown for any portion of such fees. 20 V. c. 56, s. 16.

XVI. The Governor in Council may, from time to time, appoint an additional Clerk or additional Clerks in the Court, when the business of the Court requires the same and the Judges of the Court apply for such appointment, and the Clerk or Clerks shall perform such duties as the Court may, from time to time, by general orders or otherwise, direct. 20 V. c. 56, s. 18.

XVII. Every Officer of the Court before he enters upon his duties shall take and subscribe the following oath, which oath shall be administered by the Judges, or one or more of them in open Court :

" I, A. B., of                      , do hereby solemnly swear, " that I will, according to the best of my skill, learning, " ability, and judgment, well and faithfully execute and " fulfil the duties of the office of Master, &c., (*as the case may be,*) without favour or affection, prejudice or " partiality, to any person or persons whomsoever. So " help me God." 7 W. 4, c. 2, s. 20.

XVIII. When not convenient to a person appointed to any office to attend at Toronto, to take the oath of office, the Court may direct the oath to be taken before the Judge of the County Court of the County in which such Officer resides, and the oath shall be certified by such Judge and filed in the Office of the Registrar. 1 V. c. 14, s. 3.

XIX. Sheriffs, Deputy Sheriffs, Gaolers, Constables and other Peace Officers, shall aid, assist and obey the Court and the Judges thereof respectively in the exercise of the jurisdiction conferred by this Act, and otherwise, whenever by any general or other order of the Court or of a Judge thereof, required so to do. 20 V. c. 56, s. 6, —7 W. 4, c. 2, s. 14.

All commissions of sequestration are to be directed to the Sheriff, unless some good reason exists for the contrary, *Ord.* 48, s. 4.

For the fees payable to Sheriffs and Coroners for services, and for executing the process of the Court, See *Ord.* 65.

XX. The Court shall be holden at the City of Toronto or in any other place from time to time appointed by Proclamation of the Governor. 7 W. 4, c. 2, s. 1.

XXI. The Judges shall sit together for all business

not directed by general or other orders to be transacted before a single Judge, and in such case the Chancellor or, if he be absent, the Senior Vice Chancellor shall preside. 12 V. c. 64, s. 7.

At present all causes are heard before a single Judge in the first instance; either on circuit, when issue has been joined, and witnesses have been examined, or at Toronto, on motions for decree, or *pro confesso*. The full Court of three Judges sits at Toronto, for the purpose of re-hearing causes four times a year, on the second Thursday in March, first Thursday in June, second Thursday in September, and first Thursday in December, *Ord. 86*.

XXII. The Judges may sit separately, either at the same time or at different times, for the hearing and disposing of such matters and the transaction of such business as may from time to time in that behalf be directed by general or other orders of the Court; and the decrees and orders made by a single Judge in such cases shall have the force and effect of, and be deemed for all purposes to be, decrees and orders of the Court, but shall be subject to re-hearing before the full Court or otherwise, in such cases as the Court, by general orders or otherwise, from time to time directs or appoints; and every Judge so sitting separately, whether at Toronto or elsewhere, shall have all the powers of the full Court, subject to any general orders in that behalf. 20 V., c. 56, s. 7.

The Judges availing themselves of the power given by this section, sit in Court separately, on alternate weeks. Monday is appropriated to the hearing of special motions; Tuesday to hearings *pro confesso*, by way of motions for decree and appeals from masters' reports, *Ord. 82, s. 3*.

XXIII. The Judges, or one or more of them, shall also take circuits for the transaction of such business of the Court as it may be practicable and conducive to the interests of suitors and the convenient administration of justice to dispose of on such circuits; and for that purpose, the Court, or one or more of the Judges thereof, may hold



sittings for the purposes of taking such evidence and hearing such causes and other matters, and transacting such other business, and at such periods and at such County Towns, as the Court from time to time sees fit to direct and appoint; and such sittings may, at the discretion of the Court or of the Judge who is to hold the same, be held in the Court House of the County Town in which the same are appointed to be held, or in such other place in the County Town as the Judge selects; and the Judge shall in all respects have the same authority as a Judge at *Nisi Prius* in regard to the use of the Court House, Goal and other buildings or apartments set apart in the County for the administration of justice. 20 V., c. 56, s. 6.

In pursuance of the authority given by this section the Court has divided the Province into three circuits, and has appointed a number of County Towns as places at which witnesses may be examined and causes heard.

The Venue must be laid at one of the Towns so appointed for holding examinations, *Ord.* 56.

Causes are now heard at the same time that the witnesses are examined, upon the close of such examination; no evidence to be used on the hearing of a cause is to be taken before any Examiner or Officer of the Court, unless by the order first had of the Court, or a Judge thereof, upon special grounds adduced for that purpose, *Ord.* 97. The special grounds on which the indulgence is asked should appear on affidavit, as on applications under *Ord.* 55; but it is presumed the application to have the evidence taken otherwise than before the Court, must be on notice and not *ex parte*.

When the examination of witnesses before a Judge is to be had in any town or place other than that in which the pleadings are filed, the party setting down the cause must procure the transmission of the pleadings from the office in which they are filed, to the registrar or deputy registrar, at the place where the examination is to take place, *Ord.* 97, s. 2.

The order says nothing as to the transmission of any papers but the pleadings, but it is presumed other papers, such as documents produced under order, will be transmitted also if required.

XXIV. All witnesses in any matter pending before the Court, or before any of the Masters thereof, shall give their testimony *viva voce*, and be subject to examin-

ation by Counsel, in the presence of one or more of the Judges, or of the Masters, unless it be otherwise ordered by the Court, on special grounds, or with the consent of the parties in the suit or controversy to which the testimony relates. 7 W. 4, c. 2, s. 5.

No written interrogatories for the examination of either parties or witnesses, either before or after decree, are to be filed except by leave of the Court. Examinations are to be *viva voce*, and may be conducted either by the parties, or by their solicitors or counsel, *Ord.* 21. Interrogatories are still permitted for the examination of witnesses, out of the jurisdiction, under commission. For the mode in which witnesses are to be examined before the Court, and the proceedings upon setting down causes for examination, see *Ord.* 56.

XXV. The rules of decision in the Court shall, except when otherwise provided, be the same as governed the Court of Chancery in England in like cases on the fourth day of March, one thousand eight hundred and thirty-seven, and the court shall possess power to enforce obedience to its orders, judgments and decrees, to the same extent as was then possessed by the Court of Chancery in England. 7 W. 4, c. 2, s. 6,—12 V. c. 64, s. 9.

XXVI. The Court shall have the like jurisdiction and power as by the laws of England were at the said date possessed by the Court of Chancery in England, in respect of the matters hereinafter enumerated, that is to say:—(1.) In all cases of fraud, and accident; (2.) And in all matters relating to trusts, executors and administrators, co-partnership and account, mortgages, awards, dower, infants, idiots, lunatics and their estates; (3.) And also to stay waste; (4.) To compel the specific performance of agreements; (5.) To compel the discovery of concealed papers or evidence, or such as may be wrongfully withheld from the party claiming the benefit of the same; (6.) To prevent multiplicity of suits; (7.) To stay proceedings in a Court of Law prosecuted against equity and good conscience; (8.) To decree the

issue of Letters Patent from the Crown to rightful claimants; (9.) To repeal and avoid Letters Patent issued erroneously or by mistake or improvidently or through fraud; (10.) And generally, the like jurisdiction and power as the Court of Chancery in England possessed on the tenth day of June, one thousand eight hundred and fifty-seven, as a Court of Equity to administer justice in all cases in which there exists no adequate remedy at Law. 7 W. 4, c. 2, s. 2,—16 V. c. 159, s. 21,—13, 14 V. c. 50, s. 4,—20 V. c. 56, s. 1,—12 V. c. 64, s. 8.

XXVII. The Court may grant an injunction to stay waste in a proper case, notwithstanding that the party in possession claims by an adverse legal title. 20 V. c. 56, s. 4.

XXVIII. The Court shall have jurisdiction to try the validity of Last Wills and Testaments, whether the same respect real or personal estate, and to pronounce such Wills and Testaments to be void for fraud and undue influence or otherwise, in the same manner and to the same extent as the Court has jurisdiction to try the validity of deeds and other instruments. 12 V. c. 64, s. 10.

XXIX. The Court shall also have jurisdiction to decree alimony to any wife who would be entitled to alimony by the law of England, or to any wife who would be entitled by the law of England to a divorce and to alimony as incident thereto, or to any wife whose husband lives separate from her without any sufficient cause and under circumstances which would entitle her, by the law of England, to a decree for restitution of conjugal rights; and alimony when decreed shall continue until the further order of the Court. 7 W. 4, c. 2, s. 3,—20 V. c. 56, s. 2.

In suits for alimony the court or a Judge thereof may, in a proper case order a writ of arrest, to issue at any time after the bill has been filed, and shall in the order fix the amount of bail to be given by the defendant, in

order to procure his discharge, *Con. Stat. U. C.*, c. 24, s. 9; the amount of bail shall not exceed sufficient to cover the amount of future alimony for two years, besides arrears and costs, but may be for less at the discretion of the court, *Ibid.*, s. 10.

Although in England the mere fact of desertion by the husband, will not entitle the wife to a decree for alimony; still, as in this country, the court cannot decree restitution of conjugal rights, desertion would be sufficient to warrant a decree for alimony, and desertion coupled with other acts of cruelty forms a material ingredient in determining a wife's right to relief, *Severn v. Severn*, 3 Grant 431.

Where, a few days after her departure from her husband's house, the wife was found with severe bruises and injuries upon her person, which in the opinion of a medical man, must have been caused by external physical violence not occasioned by a fall or other accident, and the husband having been shewn to have used violence towards her on other occasions, and in other ways had so conducted himself as to raise a strong presumption that the bruises and injuries were inflicted by him, the court made a decree for alimony, *Jackson v. Jackson*, 8 Grant, 499.

The court will in a proper case grant interim alimony *pendente lite*, *Soules v. Soules*, 3 Grant 113; which is applied for in Chambers upon notice supported by affidavits. But where interim alimony had not been applied for, the court refused to carry the allowance for alimony back to a date beyond the time of making the decree, *Ibid.* In suits for alimony, the plaintiff, when she succeeds, is entitled, as a general rule, to her full costs of suit, *Ibid.*; and even where, at the hearing, the bill was dismissed, the court refused to dismiss the bill until the arrears of interim alimony, and costs taxed *de die in diem* had been paid by the defendant, *McKay v. McKay*, 6 Grant, 383.

Where the plaintiff in an alimony suit, after an order for interim alimony had been made, returned to her husband's house, and resided there for some time, but was afterwards obliged to leave by reason of cruelty, a motion to set aside the interim order on the ground of condonation, was refused with costs, *Maxwell v. Maxwell*, Cham. R. 27.

The defendant having signed a consent to an order being made directing him to pay the plaintiff a certain sum for alimony, on motion in Chambers for an order in terms of the consent; held, that the matter must be brought before the court, as such an order would amount in reality to a decree in the cause, *Craig v. Craig*, Cham. R., 41.

In fixing the amount of alimony to be paid, the husband's income is the proper guide, *Severn v. Severn*, 7 Grant, 109; allowance increased from £25 to £200 per annum, it being shewn that the husband's income had increased, *Ibid.*

XXXI. In the case of Lunatics, Idiots and persons of unsound mind, and their Property and Estates, the juris-

diction of the Court shall include that which in England is conferred upon the Lord Chancellor by a Commission from the Crown, under the Sign Manual. 9 V. c. 10. s. 1.

XXXII. The word "Lunatic" is used in the subsequent sections of this Act as including an Idiot or other person of unsound mind. 9 V. c. 10, s. 1.

XXXIII. The Court may, on sufficient evidence, declare a person a lunatic without the delay or expense of issuing a Commission to enquire into the alleged lunacy, except in cases of reasonable doubt. 20 V. c. 56, s. 5.

XXXIV. When a Commission has been issued and an inquisition thereupon returned into Court, by which a person is found Lunatic, in case any one entitled to traverse the inquisition desires to do so, he may within three months from the day of the return and filing of the inquisition, present a petition for that purpose to the Court, and the Court shall hear and determine the petition subject to the following provisions: 9 V. c. 10, s. 2.

1. In every order giving effect to such petition, the Court shall limit a time not exceeding six months from the date of the order, within which the person desiring to traverse, and all other proper parties, shall proceed to the trial of the traverse; but the Court may under the special circumstances of any case, and upon a petition being presented for that purpose, and upon the circumstances being substantiated upon affidavit, allow the traverse to be had or tried after the time limited; and in such special case, the Court may make such orders as seem just; 9 V. c. 10, s. 3.

2. The trial may be ordered to take place in any Court of Record in Upper Canada, or before a Judge of the Court of Chancery with the aid of a Jury, according to the circumstances of the case and the situation of the parties; 9 V. c. 10, s. 3,—20 V. c. 56, s. 13.

3. The Court may order that the person to traverse, if he is not the party who has been found Lunatic, shall, within one month after the date of the order, file with the Registrar of the Court a bond, with one or more sureties, in favor of the Registrar for the time being, and conditioned for all proper parties proceeding to the trial of the traverse within the time limited; such bond before the filing thereof being approved of and certified to be sufficient by the Judge of the County Court of the County in which the parties reside, or by one of the Judges or Masters of the Court of Chancery;

4. Every person who does not present his petition, or who neglects to give the security, or who does not proceed to the trial of the traverse, within the times respectively limited therefor, and the heirs, executors and administrators of every such person, and all others claiming through him, shall be absolutely barred of the right of traverse. 9 V. c. 10, s. 3.

XXXV. In case the Court declares a person a lunatic without issuing a Commission, any person who might traverse an inquisition to the same effect, may move against the order containing the declaration, or may appeal therefrom, as the case requires; and the right so to move or appeal shall as to time be subject to the same rules as the right to traverse. 20 V. c. 56, s. 5.

XXXVI. In case the Court be dissatisfied with the verdict returned upon a traverse, the Court may order a new trial, or more than one new trial as in other cases. 9 V. c. 10, s. 4.

XXXVII. In order to afford due protection to the property of Lunatics, the following provisions shall in every case be observed: 9 V. c. 10, s. 5.

1. The Committee of the estate shall give two or more responsible persons as sureties, in double the amount of

the personal estate, and of the annual rents and profits of the real estate, for duly accounting for the same once in every year, or oftener if required by the Court; and the security shall be taken by bond or recognizance in the name of the Registrar of the Court for the time being, in such manner as the Court or a Master thereof may direct, and the same shall be filed in the office of the Registrar;

2. The Committee of the estate shall, within six months after being appointed, file in the office of the Registrar a true inventory of the whole real and personal estate of the Lunatic, stating the income and profits thereof, and setting forth the debts, credits and effects of the Lunatic, so far as the same have come to the knowledge of the Committee;

3. If any property belonging to the estate be discovered after the filing of an inventory, the Committee shall file a true account of the same from time to time, as the same is discovered; and

4. Every Inventory shall be verified by the oath of the Committee. 9. V. c. 10, s. 6.

Committees of the persons and estates of lunatics, idiots, and persons of unsound mind, are to be appointed in the same manner as receivers, as nearly as circumstances will permit, *Ord. 38, s. 2*; for the mode of proceeding on the appointment of a receiver, see *Ibid. s. 1*.

**XXXVIII.** Whenever the personal estate of a Lunatic is not sufficient for the discharge of his debts, the following steps may be taken: 9 V., c. 10, s. 7.

1. The Committee of his estate shall petition for authority to mortgage, lease or sell so much of the real estate as may be necessary for the payment of such debts;

2. Such petition shall set forth the particulars and amount of the estate real and personal of the Lunatic, the application made of any personal estate, and an account of the debts and demands against the estate;



3. The Court shall, by one of the Masters or otherwise, inquire into the truth of the representations made in the petition, and hear all parties interested in the real estate ;

4. If it appears to the Court that the personal estate is not sufficient for the payment of debts, and that the same has been applied to that purpose as far as the circumstances of the case render proper, the Court may order the real estate or a sufficient portion of it to be mortgaged, leased or sold either by the Committee or otherwise ;

5. The Court shall direct the Committee to discharge such debts, out of the money so raised, and the Court may order the Committee to execute conveyances of the estate, and to give security for the due application of the money, and to do such other acts as may be necessary in such manner as the Court may direct ; and

6. In the application of any moneys so raised, the debts shall be paid in equal proportion without giving any preference to those which are secured by sealed instruments.

XXXIX. When the personal estate, and the rents, profits and income of the real estate of the Lunatic, are insufficient for his maintenance or that of his family, or for the education of his children, an application may be made by the Committee, or by any member of the family of the lunatic, that the Committee be authorized or directed to mortgage or sell the whole or part of the real estate, as may be necessary ; upon which the like reference and proceedings shall be had, and a like order made, as for the payment of debts. 9 V., c. 10, s. 8.

XL. In case of any mortgage, lease or sale being made, the lunatic and his heirs, next of kin, devisees, legatees, executors, administrators and assigns, shall have the like interest in the surplus which remains of



the money raised as he or they would have in the estate, if no mortgage, lease or sale had been made ; and such money shall be of the same nature and character as the estate mortgaged, leased or sold ; and the Court may make such orders, as are necessary for the due application of the surplus. 9 V., c. 10, s. 9.

**XLI.** When a Lunatic is seised or possessed of real estate, by way of mortgage, or as a Trustee for others in any manner, the Committee may apply to the Court for authority to convey such real estate to the person entitled thereto, in such manner as the Court may direct ; and thereupon the like proceedings shall be had as in the case of an application to sell the real estate ; and the Court upon hearing all the parties interested may order a conveyance to be made ; and on the application, by bill or petition, of any person entitled to a conveyance, the Committee may be compelled by the Court, after hearing all parties interested, to execute the conveyance. 9 V., c. 10, s. 10.

**XLII.** Every conveyance, mortgage, lease and assurance made by the Committee under direction of the Court, pursuant to any of the provisions of this Act, shall be as valid as if executed by the Lunatic when of sound mind. 9 V., c. 10, s. 11.

**XLIII.** The Court may compel the specific performance of any contract made by a Lunatic while capable of contracting, and may direct the Committee to execute all necessary conveyances for the purpose ; and the purchase money, or so much thereof as remains unpaid, shall be paid to the Committee or otherwise as the Court directs. 9 V., c. 10, s. 12.

**XLIV.** The Court may order any expenses and costs of and relating to the said petitions, orders, directions and conveyances to be paid and raised from the lands,

rents or personal estate of the Lunatic, in respect of which the same were respectively made, in such manner as the Court thinks proper. 9 V., c. 10, s. 13.

XLV. In regard to the partition and sale of estates of joint tenants, tenants in common and coparceners, the Court shall possess the same jurisdiction as by the laws of England on the tenth of August, one thousand eight hundred and fifty, was possessed by the Court of Chancery in England, and also as by the laws of Upper Canada is possessed by the Courts of Queen's Bench and Common Pleas or by the County Courts. 13, 14 V., c. 50, s. 4.

XLVI. In such cases, any Decree, Order or Report by which a partition or sale is declared or effected, or any Deed executed by the Master of the Court, to give effect to such partition or sale, shall have the same effect at law and in equity as the Record of a Return in the Court of Queen's Bench or Common Pleas or in the County Court has in matters of partition, or as Sheriff's Deeds now have in other cases. 13, 14 V., c. 50, s. 4.

XLVII. Any partition or sale made by the Court shall be as effectual for the apportioning or conveying away of the estate or interest of any married woman, infant or lunatic, party to the proceedings by which the sale or partition is made or declared, as of any person competent to act for himself. 13, 14 V., c. 50, s. 6.

XLVIII. An office copy of the Decree, Order or Report declaring a partition, shall be sufficient evidence in all Courts of the partition declared thereby, and of the several holdings by the parties of the shares thereby allotted to them. 13, 14 V., c. 50, s. 4.

XLIX. The Court shall also have jurisdiction respecting the custody of infants in the cases and subject

to the provisions mentioned in the Statute relating to the custody of infants. 18 V., c. 126.

By the Con. Stat. U. C., c. 74, s. 8, it is provided that, "Any of the Superior Courts of Law or Equity in Upper Canada, or any Judge of any of such Courts, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, may, if such Court or Judge sees fit, make order for the access of the petitioner to such infant, at such times and subject to such regulations as such Court or Judge thinks convenient and just, and if such infant be within the age of twelve years, may make order for the delivery of such infant to the petitioner, to remain in the care and custody of the petitioner until such infant attains the age of twelve years, subject to such regulations as such Court or Judge may direct, and such Court or Judge may also make order for the maintenance of such infant by payment by the father thereof, or by payment out of any estate to which such infant may be entitled, of such sums of money from time to time, as, according to the pecuniary circumstances of such father or the value of such estate, such Court or Judge thinks fit and reasonable."

By section 9, "The Court or Judge as aforesaid, may enforce the attendance of any person before such Court or Judge, to testify on oath respecting the matter of such petition by order or rule made for that purpose, and on the service of a copy thereof and the payment of expenses as a witness, in the same manner as in a suit or action in the said Courts respectively, or may receive affidavits respecting the matters in such petition."

Section 10 provides that, "All orders made by the Court or a Judge by virtue of this Act, shall be enforceable by process of contempt by the Court or Judge by which or by whom such order has been made."

But by section 11, "No order directing that the mother shall have the custody of or access to an infant shall be made by virtue of this Act, in favor of a mother, against whom adultery has been established by judgment in an action for criminal conversation, at the suit of her husband against any person."

L. When an infant is seised or possessed of or entitled to any real estate in fee, or for a term of years, or otherwise howsoever, in Upper Canada, and the Court is of opinion that a sale, lease or other disposition of the same or of any part thereof, is necessary or proper for the maintenance or education of the infant, or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest requires or will be substantially promoted by

such disposition, the Court may order the sale, or the letting for a term of years, or other disposition of such real estate or any part thereof, to be made under the direction of the Court or one of its officers, or by the Guardian of the infant, or by any person appointed by the Court for the purpose, in such manner and with such restrictions as to the Court may seem expedient, and may order the infant to convey the estate as the Court thinks proper. 12 V., c. 72, ss. 1, 2,—13, 14 V., c. 50, s. 8.

For the mode of proceeding under the provisions of this Act, see *Ord. 37*.

In directing the sale of infants' real estate, the Court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit; the Court will order a sale of a portion of an infants estate to save the rest when it is made to appear to be for the benefit of the infant, *Re McDonald*, Cham. R., 97.

On applying for the sale of real estate settled upon infants, the mother, by whom the application was made, was required to join in the conveyance for the purpose of surrendering the life interest vested in her under the settlement, *Re Kennedy*, Cham. R., 97.

LI. But no sale, lease or other disposition shall be made against the provisions of any will or conveyance by which the estate has been devised or granted to the infant or for his use. 12 V., c. 72, s. 2.

LII. The application shall be in the name of the infant by his next friend, or by his guardian; but shall not be made without the consent of the infant if he is of the age of seven years or upwards. 12 V., c. 72, s. 1.

The petition is to be presented by the guardian of the infant, or by a person applying by the same petition to be appointed Guardian, *Ord. 37*, s. 2; when the infant is above the age of seven years he is to be examined apart upon the matter of the petition, and his consent thereto, and when he is under the age of seven, the fact is to be certified by the Judge or master before whom he is produced, *Ibid.* s. 6.

LIII. Where the Court deems it convenient that a conveyance should be executed by some person in the place of the infant, the Court may direct some other person in

the place of the infant, to convey the estate. 12 V., c. 72, s. 3.

LIV. Every such conveyance whether executed by the infant or some person appointed to execute the same in his place, shall be as effectual as if the infant had executed the same, and had been of the age of twenty-one years at the time. 12 V., c. 72, s. 3.

LV. The moneys arising from any such sale, lease or other disposition, shall be laid out, applied and disposed of in such a manner as the Court directs. 12 V., c. 72, s. 4.

LVI. On any sale or other disposition so made, the money raised, or the surplus thereof, shall be of the same nature and character as the estate sold or disposed of; and the heirs, next of kin, or other representatives of the infant, shall have the like interest in any surplus which may remain of the money at the decease of the infant, as they would have had in the estate sold or disposed of if no sale or other disposition had been made thereof. 12 V., c. 72, s. 5.

LVII. If any real estate of an infant is subject to dower, and the person entitled to dower consents in writing to accept in lieu of dower any gross sum which the Court thinks reasonable, or the permanent investment of a reasonable sum in such manner that the interest thereof be made payable to the person entitled to dower during her life, the Court may direct the payment of such sum in gross or the investment of such other sum, out of the proceeds of the sale of the Real Estate of the Infant. 12 V., c. 72, s. 6.

LVIII. Whereas the law of England was at an early period introduced into Upper Canada, and continued to be the rule of decision in all matters of controversy rela-

tive to property and civil rights, while at the same time, from the want of an equitable jurisdiction, until the fourth day of March, one thousand eight hundred and thirty-seven, it was not in the power of mortgagees to foreclose, and mortgagors out of possession were unable to avail themselves of their equity of redemption, and in consequence of the want of these remedies the rights of the respective parties, or of their heirs, executors, administrators or assigns, may be attended with peculiar equitable considerations, as well in regard to compensation for improvements, as in respect to the right to redeem, depending on the circumstances of each case, and a strict application of the rules established in England might be attended with injustice; the Court shall have authority in every case of mortgage, where, before the said fourth day of March, one thousand eight hundred and thirty-seven, the estate had become absolute in law, by failure in performing the condition, to make such decree in respect to foreclosure or redemption, and with regard to compensation for improvements, and generally with respect to the rights and claims of the mortgagor and mortgagee, and their respective heirs, executors, administrators or assigns, as may appear to the Court just and reasonable under all the circumstances of the case, subject however to appeal by either party. 7 W. 4, c. 2 s. 11.

The Court of Chancery may under certain circumstances refuse redemption, notwithstanding twenty years have not elapsed since the mortgagor went out of possession, *Simpson v. Smyth*, 1 Error and Appeal, R. 172.

In cases of actual mortgage, that is where the proviso for redemption appears on the face of the instrument creating the incumbrance, the dormant equities act does not apply; but such cases are to be dealt with under the 11th clause of the original Chancery Act, *Hall v. Coldwell*, 8 U. C., L. J. 93.

LIX. Whereas by the act to establish the Court of Chancery in Upper Canada, it was provided that the rules of decision in the said Court should be the same as

governed the Court of Chancery in England; and whereas in regard to claims upon, or interests in real estate arising before the said date, it is just to restrict the future application of the said rules of decision to cases of fraud, and in regard to other cases, it is expedient to extend thereto in manner hereinafter provided, the authority so given to the court as aforesaid in case of mortgages: Therefore, no title to or interest in real estate which is valid at law, shall be disturbed or otherwise affected in Equity by reason of any matter or upon any ground which arose before the 4th day of March, A.D. 1837, or for the purpose of giving effect to any equitable claim, interest or estate, which arose before the said date, unless there has been actual and positive fraud in the party whose title is sought to be disturbed or affected. 18 V. c. 124, s. 1.

This section does not apply to cases of actual mortgage, where the proviso for redemption appears on the face of the instrument creating the incumbrance; such cases are to be dealt with under section 11 of the original Chancery Act, *Hall v. Coldwell*, 8 U. C., L. J. 93.

It was held by the Court of Chancery that express trusts are not within the statute relating to Dormant Equities, *Atty. Gen. v. Grassett*, 6 Grant, 485; but the Court of appeal has decided that the Act applies as well to express trusts, as to trusts created by implication of law, *Wragg v. Beckett*, 7 Grant, 220; *quære* whether the act applies to every case of express trust, or whether a case of express trust so direct and plain might not arise, that the Court would feel authorised to hold that the statute does not extend to it, though no exception of express trusts is contained in the Act, *Atty. Gen. v. Grassett*, (in appeal) 8 Grant, 130.

In *Arner v. McKenny*, the three Judges of the Court of Chancery decided, [1] that notwithstanding the Dormant Equities act, the Court would grant relief in the case of an equitable title to land which had been embraced in a conveyance by mistake, where the legal title of the grantee under such conveyance was not asserted before the passing of the Chancery Act, and where the equitable title of the grantor had been asserted by possession after the passing of that Act; and [2] that it was an actual fraud within the meaning of the exception in the dormant equities act, for the grantor under the circumstances to assert his legal title.

In *Malloch v. Pinhey*, the first point decided in *Arner v. McKenny*, was decided in the same way by V. C. Esten, in favour of a plaintiff who filed a bill to have an absolute deed made before the passing of the Chancery



Act declared a mortgage, and for redemption, where the defensible nature of the title had been admitted, and no absolute title had been asserted till long after the passing of that act. The V. C. also expressed his opinion that the decision in *Hall v. Coldwell* applied to this case, though this point was not determined.

In *Tiffany v. Thompson*, Vankoughnet, C., said, "In my opinion the Dormant Equities Act does not apply to a case of express trust, for breach of which the *cestui que trust* seeks redress against the trustee, and in the case of such a trust as the present, in which the trustee is called to account, it can form no defence to him. I think the rule of construction should be that the act does not apply as between trustee and *cestui que trust* to the cases of such trust, but that exceptional cases arising upon such trusts may find protection under it. I agree with what has been so well said by the late Chancellor, and V. C. Spragge in *Wragg v. Beckett*, upon the question which I do not understand to be settled by any judgment of the Court of Appeal."

LX. In regard to any other equitable claim or right which may have arisen before said date, the Court shall have authority (subject to appeal) to make such Decree as may appear to the Court just and reasonable, under all the circumstances of the particular case, provided that the suit be brought within twenty years from the time when the right or claim arose; and no further time shall be allowed for bringing any such suit, notwithstanding any disability of the claimant or of any one through whom his right accrued. 18 V. c. 124, s. 2.

LXI. The Court shall have jurisdiction to entertain appeals by either party against any Order or Decree made by the Judge of a County Court under the equitable jurisdiction thereof, and the Court of Chancery shall make such Order thereupon in respect to costs or otherwise, or for referring back the matter to the Judge before whom the same was first heard, as may be just and proper. 16 V. c. 119, s. 18.

*Ord. 44*, of the County Court Equity orders, relating to appeals is as follows:—Any person desiring to appeal from any decree or order shall, within four weeks from the day on which such decree or order shall be pronounced, file in the clerk's office a bond, with an affidavit of the due execution thereof, together with an affidavit of justification by the sureties in such bond, and shall serve upon the opposite party, his attorney or



agent, a notice to the following effect: "The plaintiff (or defendant as the case may be) intends to appeal from the decree (or order) pronounced in this cause on or about the                      day of                      last, and has filed with the clerk of the County Court a bond for the due prosecution of such appeal, with an affidavit of justification by the sureties thereto."

SEC. 2.—The security to be given on appeals shall, unless otherwise specially ordered by the judge of the County Court, be by bond to the respondent in the sum of £20, which bond shall be executed by the appellant, or appellants, or one of them, and by two sufficient sureties (or if appellants or appellant be absent from Upper Canada, then by three sufficient sureties), and the condition thereof shall be to the effect that the appellant shall and will effectually prosecute his appeal, and pay such costs and damages as shall be awarded in case the decree or order appealed from shall be affirmed or in part affirmed.

SEC. 3.—The parties to such bond as sureties shall by affidavit each make oath that he is a resident householder or freeholder in Upper Canada, and worth the sum mentioned in such bond over and above what will pay and satisfy all his debts.

SEC. 4.—Such bond shall stand allowed, unless the respondent shall within ten days after service of the notice required by the first section of this order, move the judge to disallow the same.

SEC. 5.—The petition of appeal shall be filed in the office of the registrar of the Court of Chancery within five weeks from the day on which the decree or order appealed from shall have been pronounced, and a copy thereof, together with an appointment for the hearing of the appeal, to be obtained from the Court of Chancery or a judge thereof, is to be served upon the respondent, his attorney or agent, at least three weeks before the time appointed for the hearing of the appeal; the time to be appointed for the hearing is to be not more than five weeks from the day of filing the petition of appeal, unless the court or judge making such appointment shall think proper to appoint a more distant time, under the circumstances.

SEC. 6.—The appeal and the perfecting the security thereupon shall stay proceedings in the court appealed from in the following cases, upon the terms provided in respect thereof, that is to say:

- (1) When the appeal is from an order or decree directing the payment of money, unless the party appellant shall have further given security to the satisfaction of the judge, that, if the decree or order or any part thereof be affirmed, the appellant will pay the amount directed to be paid by the decree or order, or to the part of such amount as to which the same shall be affirmed, if it be affirmed only in part, and all damages which shall be awarded against the appellant on the appeal.
- (2.) Where the decree or order appealed from directs the assignment or delivery of documents or personal property, the execution of the judgment or decree shall not be stayed by the perfecting of the security hereinbefore firstly required, unless the things directed to be

assigned or delivered be brought before the judge or placed in the custody of such officer or receiver as the judge shall appoint; or, unless security be given to the satisfaction of the judge, and in such sum as the judge shall direct, that the appellant will obey the order of the Court of Chancery on the appeal.

- (3.) Where the decree or order appealed from directs the execution of a conveyance or other instrument, the execution of the order or decree shall be executed and deposited with the proper officer of the County Court, to abide the judgment of the Court of Chancery.
- (4.) Where the decree or order appealed from directs the sale or delivery of possession of real property or chattels real, the execution of the same shall not be stayed, unless proper security be entered into to the satisfaction of the judge, that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon; and that if the decree or order be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, the amount of which said security shall be fixed by the said judge.
- (5.) When the decree or order is for the sale of property, and the payment of any deficiency arising upon the sale, the security shall also provide for the payment of such deficiency.

In the cases above provided for, proceedings in the County Court shall not be stayed except upon the order of the judge, which he may grant *ex parte* or upon notice, as he may see fit.

In other cases proceedings are not to be stayed except by order of the Court of Chancery or a judge thereof, to be applied for by motion, and to be granted by such court or judge *ex parte* or upon notice, and upon such terms as such court or judge may think proper.

SEC. 7.—Upon the perfecting of the security for the appeal, it shall be the duty of the County Court judge, at the instance and at the expense of the appellant, to cause the pleadings, evidence and documents filed or deposited in his court, to be transmitted to the registrar of the Court of Chancery by mail or otherwise, as he may think expedient, provided that if the parties consent that any document be not sent to the Court of Chancery as being not material to the matter appealed, it shall not be his duty to transmit the same; and in case he shall be clearly of opinion that certain documents are not material to the matter appealed, and that for any reason it is inexpedient to transmit the same, he may, instead thereof, certify his reasons for not transmitting the same; unless documents are retained for either of the reasons set forth, the judge is to certify to his sending all the pleadings, papers, evidence or documents filed and deposited in his court.

LXII. The Court shall also have jurisdiction on any appeal from the judgment or decision of the Commis-

sioners under the Act for the protection of the lands of the Crown in Upper Canada, except as in the said Act is otherwise provided; and the Court may alter, affirm or annul, the decision of the Commissioners, or order further inquiry to be made, or direct an issue touching the matter in dispute, to be tried at law or before the Court or a Judge thereof with the assistance of a Jury, and may make such orders and directions therein for payment of costs, and other matters respecting the same, as to the Court seem just; and the decree of the Court shall be conclusive on the party appealing, as well as on the Commissioners. 2 V. c. 15, s. 11.

LXIII. In every case in which the Court has authority to order the execution of a deed, conveyance, transfer or assignment of any property, real or personal, the Court may make an order or a decree vesting such real or personal estate in such person or persons, and in such manner, and for such estates, as would be done by any such deed, conveyance, assignment or transfer if executed; and thereupon the order or decree shall have the same effect both at Law and in Equity as if the legal or other estate or interest in the property had been actually conveyed, by deed or otherwise, for the same estate or interest, to the person in whom the same is so ordered to be vested, or in the case of a *chose in action*, as if such *chose in action* had been actually assigned to such last mentioned person. 20 V. c. 56, s. 8.

The court can make a vesting order in those cases only in which it has authority to order the execution of a deed, conveyance, transfer or assignment of any property. So where the plaintiff in a mortgage suit for sale has leave to bid and becomes the purchaser, the court cannot make an order vesting the property in him, inasmuch as he is the person who, in the event of a third person having become the purchaser, would have had to execute the conveyance; the mortgagor or his heirs not being proper parties to such a conveyance, *Ross v. Steele*, Cham. R. 94; *Re Williams*, 21 L. J., N. S., ch. 487.

A party purchasing under a decree of the Court, has a right to call for

evidence, shewing that persons whose interests were intended to be disposed of, were alive at the time of such sale, before accepting title by means of a vesting order, *Slater v. Fiskin*, Cham. R., 1.

LXIV. The filing of a bill or the taking of a proceeding, in which bill or proceeding any title or interest in land is brought in question, shall not be deemed notice of the bill or proceeding to any person not being a party thereto, until a certificate by the Registrar or a Deputy Registrar of the Court, in the form mentioned in this section, has been registered in the Registry office of the County in which the land is situate :—

“ I certify that in a suit or proceeding in Chancery between A. B. and C. D., some title or interest is called “ in question in the following land, (*describing it.*) ”

But no certificate is required to be registered of a suit or proceeding for the foreclosure of a registered mortgage. 18 V. c. 127, s. 3,—20 V. c. 56 ; s. 9.

LXV. Every decree affecting land may be registered in the Registry Office of the County where the land is situate, on a certificate by the Registrar or a Deputy Registrar of the Court, setting forth the substance and effect of the decree, and the land affected thereby. 18 V. c. 127, s. 4.

LXIX. In any case in which the Court requires an issue to be tried by a jury, it shall not be necessary to commence any feigned action in a Court of Law ; but upon an office copy of the decree or order directing the trial of the issue, being entered for trial in the same manner as a *Nisi Prius* record is entered, the issue shall be tried at the Assizes, or at the sittings of a County Court in Upper Canada, in the same manner as issues are tried in actions brought in the Superior Courts of Law or in the County Courts, and the finding of the jury shall be endorsed upon such office copy and signed by the presiding Judge, and the office copy shall then be

transmitted to the Registrar of the Court of Chancery; or instead of directing an issue to be tried at law, the Court may try the same by a jury without the intervention of a Court of Common Law, and may issue a precept or order directed to the Sheriff of any County the Court sees fit, requiring him to strike and summon a Jury for that purpose; and at the trial, one Judge or more of the Court of Chancery may sit or preside. 20 V. c. 56, s. 13.

The order directing the issue specifies the question or questions of fact to be submitted to the jury, and it usually provides that the parties are to be at liberty to read the depositions taken in the cause of any witness who may be dead, or incapable of attending the trial, *Palmer v. Lord Aylesbury*, 15 Ves. 176; *Watkins v. Aitchison*, 10 Hare, app. 46.

The order also directs at what assizes the issue is to be tried, and reserves further directions, or adjourns the further hearing until after the trial.

A party to an issue is not, by going to trial precluded from appealing against the order directing the issue, *Bullin v. Masters*, 2 Phil. 290; *Parker v. Morrell*, 12 Jur., 253.

When the plaintiff neglects to proceed to trial of the issue, the opposite party should move upon notice, that the plaintiff may proceed to trial at the next assizes; or in default that the issue may be taken *pro confesso*, *Casborne v. Barsham*, 5 M. & C. 113, and where the defendant in the suit, is made plaintiff in the issue the plaintiff may make the like motion, *Hartland v. Dancocks*, 5 De G. & S., 561. But the court will not adopt this course under particular circumstances, or where material witnesses were unable to attend at the trial, *Hargrave v. Hargrave*, 8 Beav., 289; or where by mistake the plaintiff has neglected to give notice of trial in time, *Varty v. Duncan*, 11 Jur., 809; and see *Reeve v. Hodson*, 17 Jur. 344.

The motion being one "relating to the conduct of a suit," may be made in chambers, *Ord.* 34. If any of the parties are dissatisfied with the verdict, they may apply for a new trial, the motion for which is made to the Court of Chancery, and not to the Court of Law, *Bootle v. Blundell*, 19 Ves. 494. Under special circumstances the Court has directed a third trial of an issue, *Hargrave v. Hargrave*, 13 Jur., 463. As to the principles which guide the Court in granting a new trial upon the ground of misdirection, see *Bennett v. Duke of Manchester*, 2 W. R. 644; S. C. 23 Law T. 331.

The general rule with respect to the costs of an issue is that they follow the event, and are given to the party who prevails at law, *Rochester v. Lee*, 2 De G., M. & G. 427; but this is liable to exceptions. The costs of an issue directed on an interlocutory application may be disposed of after the issue is decided, without waiting for the hearing, *Duncan v. Varty*, 2 Phil. 696.

Trial by Jury in Chancery will not generally be directed where either party desires a trial at law, *Peters v. Rule*, 7 W. R. 171; and cannot be directed, except at a stage of the suit, and in circumstances in which it has been the practice to direct an issue, *Bradley v. Bevington*, 4 Drew, 511; 5 Jur. N. S. 562.

The Court will not direct a trial before it on an opposed application for the purpose before the hearing; where it is clear the question is proper for such trial, the parties should agree to the application to save the expense of taking the evidence twice, *George v. Whitmore*, 26 Beav. 557.

LXX. In any suit instituted in the Court of Chancery by a mortgagee or judgment creditor, or by any other person having a charge on real property, for the foreclosure or sale of property, and to which suit any judgment creditor of the mortgagor or of the judgment debtor, or of the person liable to the charge, is a defendant, personal service on such defendant shall not be necessary, and it shall be sufficient to serve the process of the Court, whether the same be an office copy of the bill or an office copy of the decree or decretal order, upon his Attorney in the action at Law in which the judgment has been recovered; but the plaintiff in any such suit in Chancery may elect to serve the judgment creditor personally instead of serving the Attorney. 20 V. c. 56, s. 14.

This section applies only to cases of foreclosure or sale by an incumbrancer, *Munro v. Keiley*, Cham. R. 23.

When under this section an office copy of the bill is served upon the attorney at law, the three weeks notice of motion required by *Ord.* 13. s. 3, must be given, before the bill can be taken *pro confesso*; but the notice of motion may be served on the attorney, *Webster v. O'Closter*, 6 Grant, 278.

In moving for an order *pro confesso* after service upon the attorney of a judgment creditor, the affidavit of service must follow the words of the act, and shew that the party served appears as the attorney of the creditor on the roll of the judgment in respect of which he is made a party to the suit, *Cameron v. Phipps*, Cham. R. 4.

LXXI. An absent defendant may be served at any place out of the jurisdiction of the Court, with a copy of any bill or proceeding, without an application being previously made to the Court for the allowance of such

service, and the service shall be allowed on proof to the satisfaction of the Court that the same was duly made. 20 V. c. 56, s. 15.

In practice this section was never acted upon until recently, as the Court would not upon default of answer, grant an order *pro confesso*, until an order limiting the time within which the defendant was to answer had been obtained, and had been served personally upon him; and this, even although the endorsement upon the office copy of the bill required by *Ord.* 9, s. 3, had been altered so as to give the defendant the same time for answering, as the Court would give by the order authorising service of the bill out of the jurisdiction.

The necessity for obtaining an order giving leave to serve out of the jurisdiction is now done away with, and the time within which a defendant is to answer according to the distance of the place where served, and the mode of swearing affidavits of service abroad are regulated by a general order, *Ord.* 101.

LXXII. All moneys that become subject to the control and distribution of the Court, shall be paid in the name of the Accountant General of the Court into the hands of such person or body corporate, or be vested in the name of the Accountant General in the public funds of the province, or in such other securities, as the Court from time to time directs; and all interest arising from the sums so deposited or vested, shall be added to the principal sum, and be distributed therewith to the persons entitled to receive the same. 7 W. 4, c. 2, s. 7.

Money ordered to be paid into Court is to be paid into the Commercial Bank, with the privity of the registrar; the solicitor, or party paying the same, is to furnish the bank with a correct copy of so much of the order of the court as relates to such payment, with the names of the parties to the suit, and the date of the order, *Ord.* 43, s. 8. In practice no copy of the order is furnished to the bank, but a direction is obtained from the Registrar, directing the bank to receive so much money from the person paying it in, and place it to the credit of the particular suit or matter. To this direction are annexed two receipts to be signed by the proper bank officer, one of which is returned to the registrar, the other retained by the person making the payment.

All sums of money paid out of Court are paid upon the cheque of the registrar, countersigned by one of the judges of the Court, and not otherwise, *Ord.* 43, s. 8. These cheques are payable at all the agencies of the bank without discount.



LXXIII. A fee of ten cents shall be paid to the Registrar or Deputy Registrar, on the filing of every bill and of every answer or demurrer, in addition to other fees and charges thereon ; and such fee shall be paid in to an account to be called "The Suitors' Fee Fund Account," which account shall be kept and managed as may from time to time be directed by the Court, and the sums, at the credit of such account, shall be applied by the Court as may be necessary for the protection of infants and other persons not *sui juris* on whose behalf proceedings may be had in the Court, or may by the Court, be ordered to be had in other Courts. 20 V. c. 56, s. 20.

The amount payable on the filing of every bill is fifteen shillings, viz. ; two shillings and six pence by the tariff of costs fixed by the Court ; twelve shillings for the fee fund, under Con. Stat. U. C., c. 33 ; and six pence under the above section.

LXXIV. All general orders of the Court existing when this Act takes effect are hereby confirmed and declared to be as effectual as if the same were hereby specially enacted ; but the same may, from time to time, be suspended, repealed, varied and re-enacted by the Court, and shall, in all respects be subject to the control and direction of the Court and the respective Judges thereof, as in the case of any other general orders which the Court is empowered to make under the general or other jurisdiction thereof. 20 V. c. 56, s. 21. 12 V. c. 64, s. 9,

LXXV. The Court may, from time to time, make such General Orders as to the Court may seem expedient, for regulating the Offices of the Masters and Registrars, and for regulating and securing the due performance of the duties of all the Officers of the Court, and for regulating and adapting to the circumstances of this Province, the practice and proceedings of the Court, and more especially the nature and form of the process and pleadings, the taking, publishing, using and hearing of



testimony, the examination of the parties to a suit upon their oaths, *vivà voce* or otherwise, the allowance and amount of costs and every other matter deemed expedient for better attaining the ends of Justice, and advancing the remedies of Suitors ; and the Court may, from time to time, suspend, repeal, vary or revive any such orders, but no such order shall have the effect of altering the principles or rules of decision of the Court. 12 V. c. 64, s. 11. See c. 72, s. 7,—7 W. 4, c. 2, s. 4,—20 V. c. 56, s. 21.

LXXVI. All gaols in Upper Canada shall be prisons for the Court. 7 W. 4, c. 2, s. 14,—9 V. c. 10, s. 14.

## ORDERS IN CHANCERY.

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THE Judges of the Court of Chancery do hereby, in pursuance of an Act of Parliament passed in the 12th year of the reign of her present Majesty, intituled "An Act to provide for the more effectual administration of justice in the Court of Chancery, in the late province of Upper Canada," and of an act passed in the 13th and 14th years of the reign of her present Majesty, intituled "An Act to amend the Registry Law of Upper Canada," and in pursuance and execution of all other powers enabling them in that behalf, order and direct that all and every the rules, orders, and directions hereinafter set forth, shall henceforth be, and for all purposes be deemed and taken to be, general orders and rules of the Court of Chancery, viz. :

### I.—INTRODUCTORY.

These orders are not to affect suits already commenced, except as hereinafter provided ; and as to all suits hereafter to be commenced, they are to take effect on the 1st day of July, 1853.

### II.—ABROGATION OF PRIOR ORDERS.

All the orders of this Court which were in force on the 1st day of May, 1850, numbered from I. to CXCII. ; and all orders promulgated on the 7th day of May, 1850, numbered from I. to LXXXIV. ; and all orders promulgated on the 7th day of January, 1851, numbered from

I. to XXV., are hereby abrogated and discharged, except as to suits already commenced.

### III.—INTERPRETATION.

In these orders the following words have the several meanings hereby assigned to them, over and above their several ordinary meanings, unless there is something in the subject or context repugnant to such construction : (1.) Words importing the singular number include the plural number ; and words importing the plural number include the singular number. (2.) Words importing the masculine gender include females. (3.) The word " person " or " party " includes a body politic or corporate. (4.) The word " bill " includes information. (5.) The word " plaintiff " includes informant. (6.) The word " affidavit " includes affirmation. (7.) The word " legacy " includes an annuity and a specific as well as a pecuniary legacy. (8.) The word " legatee " includes a person interested in a legacy. (9.) The expression " residuary legatee " includes a person interested in the residue. (10.) The word " order " includes decree and decretal order.

The first five subsections of the above order are copied from the English orders of Court.

### IV.—LONG VACATION.

The long vacation is to commence on the 1st day of July, and to terminate on the 21st day of August in every year.

The time of the long vacation is not reckoned in the computation of the time allowed for, (1) amending or obtaining orders for leave to amend bills ; (2) setting down demurrers ; (3) filing replications, or setting down causes under the directions of Order 18, *Ord. 5, s. 4* ; nor in the time appointed or allowed for the purpose of answering either an original or amended bill, *Ord. 60*.

### V.—COMPUTATION OF TIME.

1. When any time limited from or after any date or event is appointed or allowed for doing any act or taking

any proceeding, the computation of such limited time is not to include the day of such date, or of the happening of such event, but is to commence at the beginning of the next following day; and the act or proceeding is to be done or taken at the latest on the last day of such limited time, according to such computation. (*Eng. Con. Ord.*, 37, r. 9.)

If the time limited were a fortnight, commencing on a Monday, it would include the second Monday following, *Angell v. Westcomb*, 1 M. & C., 48.

2. When the time for doing any act, or taking any proceeding is limited by months, not expressed to be calendar months, such time is to be computed by lunar months of twenty-eight days each. (*Eng. Con. Ord.*, 37, r. 10.)

See *Attorney-General v. Newbury Corporation*, Coop., 383.

3. When the time for doing any act, or taking any proceeding expires on a Sunday, or other day on which the offices are closed, and by reason thereof such act or proceeding cannot be done or taken on that day—such act or proceeding is, so far as regards the time of doing or taking the same, to be held to be duly done or taken, if done or taken on the day on which the offices shall next open. (*Eng. Con. Ord.*, 37, r. 12.)

Where the day appointed by the master's report for the payment of money fell upon a Sunday, the court refused the final order for foreclosure, though the plaintiff attended at the same place, and between the same hours, on the Saturday and Monday, *Holcomb v. Leach*, 3 Grant, 449.

4. The time for vacation is not to be reckoned in the computation of the times appointed or allowed for the following purposes, viz.: (1.) Amending or obtaining orders for leave to amend bills. (2.) Setting down demurrers. (3.) Filing replications, or setting down causes under the directions of rule XVIII.

In addition to the above, the time of the long vacation is not to be reckoned in the computation of the time appointed or allowed for the purpose of answering either an original or amended bill, *Ord.* 60.

This section does not apply to the Christmas vacation, but only to the long vacation, *Connolly v. Montgomery*, Cham. R., 20.

5. The day on which an order that the plaintiff do give security for costs is served, and the time thenceforward until and including the day on which such security is given, is not to be reckoned in the computation of time allowed a defendant to answer or demur. (*Eng. Con. Ord.*, 37, r. 14.)

If the plaintiff be resident out of the jurisdiction, the Court will on the application of the defendant order him to give security for the costs of the suit; but security will not be ordered unless all the plaintiffs are out of the jurisdiction, *Walker v. Easterby*, 6 Ves., 612.

The mere circumstance of the plaintiff having gone abroad is not a sufficient ground for ordering security, it must be shewn that he is resident abroad, or has gone abroad for the purpose of residing there, *Hoby v. Hitchcock*, 5 Ves. 699; nor will it be ordered where there is evidence of his intention to return, *White v. Greathead*, 15 Ves. 2; *Blakney v. Dufaur*, 2 DeG. M. & G. 771.

A plaintiff within the jurisdiction whose residence cannot be found, or who gives a fictitious address will be ordered to give security, *Sandys v. Long*, 7 Sim. 140; 2 M. & K. 487; *Oldale v. Whitcher*, 5 Jur. N. S. 84; a plaintiff frequently changing his abode was ordered to give security, *Player v. Anderson*, 15 Sim. 194; and security was ordered where plaintiff described himself as of a particular place, but was proved to have no fixed residence, *Calvert v. Day*, 2 Y. & C. Ex. 217; but the recent act, 22 Vic. c. 38, has effected a material change in the practice of the Court, as to granting or refusing security for costs. The fact that the plaintiff has not any fixed place of abode within the province, will not be sufficient to warrant an order for that purpose, where it is shown that he has property within the jurisdiction, *White v. White*, Cham. R. 48.

A plaintiff believed to have gone abroad to avoid payment, was ordered to give security, *Busk v. Beetham*, 2 Beav. 537; so a party only temporarily resident within the jurisdiction, *Ainslie v. Sims*, 17 Beav. 57; *Perrott v. Novelli*, 9 Jur. 770.

A British subject who had resided in the United States for several years, but had never taken any oath of naturalization, or exercised the rights of citizenship, returned to Canada, and after some months filed a bill; although several persons swore it was his intention to leave immediately on the decision of the case, yet a motion for security for costs was refused; the plaintiff swearing that it was his intention to remain in the country, *O'Grady v. Munro*, 7 Grant 106.

Security ordered where the plaintiff's solicitor refused all information as to his residence, *Bailey v. Gundry*, 1 Keen. 53; but was not required where the plaintiff's address was a house unoccupied, but tenanted by him, *Manby v. Bewicke*, 1 Jur. N.S. 1015; nor, where he was not actually resident at the address stated, but there was no intentional misdescription, *Hurst v. Padwick*, 12 Jur. 21.

Mere intention to go abroad is no ground for requiring security, *Wyllie v. Ellice*, 11 Beav. 99. Security may be required where it appears upon the bill that the plaintiff, an officer in the royal service, is resident out of the jurisdiction, unless it is distinctly stated in the bill that he is on actual service, *Lillie v. Lillie*, 2 M. & K. 404; or abroad in an official capacity, *Evelyn v. Chippendale*, 9 Sim. 497; *Clark v. Fergusson*, 5 Jur. N. S. 1155; 1 Giff. 184; and see, *Dickenson v. Duffil*, 8 U. C. L. J. 326.<sup>1</sup>

A plaintiff seeking to restrain an action at law to which he is a defendant, cannot be compelled to give security, *Watteau v. Billam*, 3 DeG. & S. 516; notwithstanding the bill may ask for relief other than the injunction, *Manley v. Williams*, Cham R. 48.

A defendant resident out of the jurisdiction presenting a petition in the suit cannot be required to give security, *Cochrane v. Fearon*, 18 Jur. 568; but a person not a party petitioning must give security, *Atkins v. Cooke*, 5 W. R. 381; *Partington v. Reynolds*, 6 W. R. 307; and so must a defendant obtaining the conduct of the cause, *Mynn v. Hart*, 9 Jur. 860. A creditor presenting a petition in an administration suit, was ordered to give security, *Drever v. Maudesley*, 5 Russ. 11.

A client resident abroad applying to tax his Solicitors' bill, must give security for the costs of the proceeding, *Re Passmore*, 1 Beav. 94; and for what shall be found due, *Anon*, 12 Sim. 262.

The application for security should be made before the defendant files his answer. Filing an answer or asking further time to answer is a waiver of the right to security, *Melioruchy v. Melioruchy*, 2 Ves. Sen. 24; *Anon*, 10 Ves. 287; *Chapin v. Clark*, V. C. Esten, 28th June, 1859; but filing a demurrer is not a waiver, *Watteau v. Billam*, 3 DeG. & S. 516; nor is filing affidavits in opposition to a motion for an injunction, *Murrow v. Wilson*, 12 Beav. 497; or in opposition to a petition, *Ex parte Seidler*, 12 Sim. 106.

Filing an answer, or asking further time is no waiver if the plaintiff's residence appears from the bill to be within the jurisdiction, and the defendant is not aware that the address given is incorrect, *Swanzy v. Swanzy*, 4 K. & J. 237; but security was refused where the answer was filed after the plaintiff had gone abroad, though sworn before he had gone, *Dyott v. Dyott*, 1 Madd. 187.

If the plaintiff goes abroad after the suit is commenced, the application for security should be made promptly upon the defendant becoming aware of it, and before he takes any further active step; but appearing on a motion to pay money into Court, was held to be no waiver, *Cooper v. Purton*, 8 W. R. 702.

Where it appears upon the face of the bill that the plaintiff is resident abroad, the order may be obtained as of course upon precept from the registrar; or from a deputy registrar, *Ord.* 44, s. 4; or on an *ex parte* application in Chambers. If it do not appear upon the bill, or if the application be made on account of the plaintiff going abroad or changing his

residence, the order must be applied for in Chambers, upon notice supported by affidavit.

The order is of no effect until served. Where a precept for an order for security was filed, and afterwards on the same day, an order to take the bill *pro confesso* was obtained, a motion to set aside the order *pro confesso* was refused, *Chapin v. Clark*, V. C. Esten, 30th June, 1859.

The time usually allowed for giving security is the same as the plaintiff would, if a defendant resident abroad, have for answering. If the security be not given within the time limited by the order, the defendant may move in Chambers upon notice, that the security be given within a limited time or in default the bill to be dismissed, *Giddings v. Giddings*, 10 Beav. 29; and the time may be enlarged upon the plaintiff's application, *Wood v. Gray*, V. C. Esten, 2nd Dec. 1856.

The amount for which the bond is given is £100, and it is made to the registrar or deputy registrar with whom the bill is filed, and all the defendants are included in one bond, *Ord. 43, s. 5*.

The plaintiff is not bound to give two sureties, unless the defendant requires him to do so, but it is always prudent to give two. If there be only one surety, and he dies or becomes bankrupt, the Court, upon the application of the defendant, will stay proceedings until a new surety is appointed, *Lantour v. Holcombe*, 1 Phill. 263; *Veitch v. Irving*, 11 Sim. 122. If the defendant intends objecting to the bond, or to the sufficiency of the surety, he must do so within two days after he is served with notice of filing the bond, *Beaton v. Boomer*, Vankoughnet C. 14th February, 1863.

The solicitor of the party cannot be his surety, *Panton v. Labertouche*, 1 Ph. 265; *Beckett v. Wragg*, Cham. R. 5; but the plaintiff may pay money into Court instead of giving security, *Cliffe v. Wilkinson*, 4 Sim. 122.

When the plaintiff is ordered to pay costs, the proper course is to serve the surety with the order, and demand payment, and on his refusing to pay, to move in Chambers for leave to sue on the bond, *Roaf v. Topping*, Cham. R. 14; *Stokes v. Cryster*, *Ibid*.

## VI.—PARTIES TO SUITS.

Formerly the subject of parties was one of great intricacy, and difficult questions often arose as to the applications of the general rules. At the present day the learning on the subject has been greatly simplified by the rules contained in this order, and by the provisions of orders 18, 29, 30, and 31; but as it still deserves, and should receive, careful study, a few observations may be made as to persons by whom a suit may be instituted. The general rule is that every person may on his own behalf file a bill, if that be the proper remedy, and the subject be within the jurisdiction of a Court of Equity; but the matter in dispute must be of sufficient value to warrant the interference of the court.

There are, however, two leading exceptions to the foregoing rule; the one of persons enjoying peculiar privileges, the other of persons labouring



under disabilities. Among the first class are, the Crown, those who partake of its prerogative, or whose rights are under its protection, and foreign States; among the second class are, married women, and infants.

### 1. *The Crown.*

Where a suit is instituted on behalf of the Crown, the matter of complaint is offered to the court by the Attorney General by way of information. Where the rights of the Crown are immediately concerned, the Attorney General proceeds upon his own authority, but where they are not immediately concerned, he depends on the relation of some person whose name is inserted in the record, and who is called the relator, *Mitford's Eq. Pl.* 22. This person in reality sustains and directs the suit; and is answerable to the court and the parties for the propriety of the proceedings and the conduct of them, *Daniel's Ch. Pr.* 13; and he is liable for the costs, *Atty. Gen. v. Smart*, 1 Ves. Sen. 72. He cannot, however, take any step in the cause in his own name and independent of the Attorney General, *Atty. Gen. v. Wright*, 3 Beav. 447. In the last mentioned case, a notice of motion having been given on behalf of the relator, an objection was made that it ought to have been on behalf of the Attorney General, and Lord Langdale decided that the notice was irregular, and said that "relators should know that they are not parties to informations, and have no right of their own authority to make any application to the court. The Attorney General is the only person whom this court recognizes in such cases." And in another case Lord Cottenham refused to hear the relator in person on behalf of the Attorney-General, and said he could not separate the information from the bill so as to hear him as the plaintiff in the suit, *Atty. Gen. v. Barker*, 4 M. & C. 262. It sometimes happens that the relator has an interest in the matter in dispute, of the injury to which interest he is entitled to complain, and in such case his personal complaint being joined to and incorporated with the information given to the court by the officer of the Crown, they form together an information and bill, and are so termed. They are, however, in some respects, considered as distinct proceedings; and the court will treat them as such, by dismissing the bill and retaining the information, even though the relief to be granted is different from that prayed, *Atty. Gen. v. Vivian*, 1 Russ. 226. Though it is usual to have a relator, yet it is not necessary, and the Attorney General may if he pleases proceed without one, *Re Bedford Charity*, 2 Swanst. 520.

As the relator is liable for the costs, neither an infant, a married woman, nor a lunatic, can be a relator, *Atty. Gen. v. Tyler*, 2 Eden. 230.

If there are several relators, the death of one of them will not affect the suit, but if they all die, or if there be but one and he dies, though the suit does not abate, the court will not allow any further proceedings until an order is obtained for liberty to insert the name of a new relator, *Atty. Gen. v. Haberdashers Co.*, 16 Jur. 717; otherwise there would be no person to pay the costs of the suit in case the information should be deemed improper, or for any other reason should be dismissed.



The application to name a new relator must be made by the Attorney General, not by the defendant, *Atty. Gen. v. Plumtree*, 5 Madd. 452.

When informations are filed on behalf of idiots and lunatics, it seems that not only must the lunatic be a party, but it is also requisite that there should be a relator who may be responsible to the defendant for the costs of the suit.

The object in requiring that there should be a relator in informations exhibited on the part of the Attorney General, is, that there may be some person answerable for the costs, in case they should have been improperly filed. Thus, where the information was held to have been unnecessary, and contrary to the right, the costs were ordered to be paid by the relator, *Atty. Gen. v. Smart*, 1 Ves. Sen. 72; but where the relator insisted upon a particular construction of the will of the person by whom the charity was founded, and in which there was considerable ambiguity, although he failed in satisfying the court that his construction was the right one, and the information was dismissed, the court did not make him liable for the costs of the defendant, *Atty. Gen. v. Oglander*, 1 Ves. 246. And in general where an information prays a relief, which is not granted, but the court thinks proper to make a decree according to the merits, so that the information is shown to have had a foundation, although the relief is not such as the relator prayed, the relator will not be ordered to pay the costs, *Atty. Gen. v. Bolton*, 3 Anst. 820.

In general where relators conduct themselves properly, and their conduct has been beneficial, they are allowed their costs, *Atty. Gen. v. Brewers Co.*, 1 P. Wms. 376.

In some cases the costs of the relators will be allowed as between Solicitor and Client, on the principle that otherwise people would not come forward to file informations, and in special cases they will be allowed their charges and expenses in addition to the costs of the suits, *Daniel's Ch. Pr.* 18; *Atty. Gen. v. Kerr*, 4 Beav. 297; *Atty. Gen. v. Ironmongers Co.*, 10 Beav. 194.

If it be made to appear to the court, after the information is filed, that the relator is not a responsible person, all further proceedings will be suspended till a proper person shall be named as relator, *Atty. Gen. v. Tyler*, 2 Eden. 280; and see *Atty. Gen. v. Knight*, 3 M. & C. 164.

An information by the Attorney General cannot be dismissed for want of prosecution, it is his privilege to proceed in what way he thinks proper; but an information in his name by a relator, is subject to be dismissed for want of prosecution, with costs, *Daniel's Ch. Pr.* 20.

## 2. Foreign Governments.

It was regarded by Lord Thurlow as doubtful, whether the sovereign of a foreign State could sue in the Municipal Courts of this country, and whether the claims of such a person were not matter of application from State to State, *Barclay v. Russell*, 3 Ves. 481; *The Nabob of the Carnatic v. East India Co.*, 1 Ves. 371; the point has now, however, been decided

in the affirmative, *The King of Spain v. Machado*, 4 Russell 225; *City of Berne v. Bank of England*, 9 Ves. 847.

To entitle a foreign government to sue, it is necessary that it should have been recognized by the English Government. This was first discussed in the *City of Berne v. The Bank of England*, when an application to restrain the Bank of England and South Sea Company from permitting the transfer of certain funds standing in the name of trustees under a purchase by the old Government of Berne before the revolution, was opposed on the ground that the existing Government of Switzerland had not been acknowledged by the Government of England, and could not be noticed by the court. Lord Eldon refused to make the order, observing that it was extremely difficult to say that a judicial court can take notice of a government never recognized by the government of the country in which the court sits; and that whether the foreign government was recognized or not, was matter of public notoriety.

The fact of the foreign government not having been acknowledged is matter of public notoriety, and must be taken judicial notice of by the court, even though there is an averment in the bill, that it has been recognized, *Taylor v. Barclay*, 2 Sim. 218.

Where a foreign state comes for the aid of the court, in the assertion of its rights, it must sue in a form which makes it possible for the court to do justice to the defendants; and it must sue in the name of some public officer, entitled to represent the interests of the state, upon whom process on the part of the defendant may be served, *The Columbian Government v. Rothschild*, 1 Sim. 104.

### 8. Corporations.

Not only have persons in their natural capacities the right to sue, but the power to sue and be sued in their corporate name is a power inseparably incident to every corporation, whether it be sole or aggregate.

As a corporation must take and grant by their corporate name, so by that name they must in general sue and be sued; and they may sue by their true name of foundation, though they be better known by another name, *Daniel's Ch. Pr.* 25.

A suit by a corporation aggregate, to recover a thing due to them in their corporate right, must not be brought in the name of their head alone but in their full corporate name, unless it appears that the Act of Parliament or charter by which they are constituted enables them to sue in the name of their head. But though it appears that the head of a corporation is enabled to sue in his own name for anything to which the corporation is entitled, this will not preclude it from suing by its name of incorporation.

In the case of a bill and information, in which the corporation of Leeds was both plaintiff and relator, an objection was made that a corporation, being a body whose identity is continuous, could not be heard to impeach transactions carried into effect in its own name by its former

governing body; but the objection was overruled by Lord Cottenham. He observed "that the true way of viewing this is to consider the members of the governing body of the corporation as its agents, bound to exercise its functions for the purposes for which they were given, and to protect its interests and property; and if such agents exercise those functions for the purpose of injuring its interests and alienating its property, shall the corporation be stopped in this court from complaining, because the act done was ostensibly an act of the corporation," *Attorney General v. Wilson*, Cr. & Ph. 1.

As a corporation cannot, unless specially authorized by their constitution, sue by their head alone, so neither can a corporation aggregate, which has a head, sue or be sued without it, because without it the corporation is incomplete. It is not, however, necessary to mention the name of the head, 1 *Kyd*, 281; nor is it necessary in the case of corporations aggregate to name any of the members by their proper christian and surnames; but if in a suit in Equity by the members of a corporation in the corporate capacity, they are mentioned by their names, the suit will not become defective by the death of some of the members, although it would have abated if the suit had been by them in their individual characters, *Blackburn v. Jepson*, 3 Swanst. 188.

A sole corporation suing for a corporate right, having two capacities, a natural and a corporate, must always shew in what right he sues.

In this respect it differs from a corporation aggregate, because the latter having only a corporate capacity, a suit in their corporate name can be only in that capacity. It also differs from corporations aggregate, in that by the death of a corporation sole, a suit by him, although instituted in his corporate capacity, becomes abated, which is not the case, as stated above, with respect to suits by corporations aggregate.

Although corporations aggregate are entitled to sue in their corporate capacity, the court will not allow parties to assume a corporate character, to which they are not entitled; and where it appears on the bill that the plaintiffs have assumed such a character without being entitled to it, a demurrer will hold, *Lloyd v. Loaring*, 6 Ves. 773.

A foreign corporation may sue in this country in their corporate name and capacity; but it is not necessary in pleading that they should set forth the proper names of the persons who form such corporation, or shew how it was incorporated; though if it be denied, they must prove that by the law of the foreign country they were effectually incorporated, *Dutch West India Company v. Vanburger*, 2 Ld. Ray. 1535.

In the case of *Lloyd v. Loaring*, above referred to, Lord Eldon gave the plaintiffs leave to amend their bill by striking out their present style as plaintiffs, and suing as individuals on behalf of themselves, and the other persons interested. And ever since it has been held, that where all parties stand in the same situation, and have one common right and one common interest, two or three, or more, may sue in their own name for the benefit of all; and on this principle large partnerships, or associations in the

nature of joint-stock-companies, though not incorporated, are permitted to maintain suits instituted in the name of a few or more individuals interested on behalf of themselves and the other parties in the concern, *Cockburn v. Thompson*, 16 Ves. 321; *Blair v. Agar*, 1 Sim. 37.

#### 4. Married Women.

As was formerly stated, one of the exceptions to the general rule that, every person may maintain a suit in Equity, was, that of persons labouring under disabilities, and among such were said to be married women and infants.

A married woman cannot, at law, sue except jointly with her husband; for she is deemed to be under his protection, and a suit respecting her rights or interests must be with the assent and co-operation of her husband. In Equity, a suit respecting the rights of a married woman, other than those in her separate estate, is brought by her and her husband jointly, and the bill is that of the husband, *Pawlett v. Delaval*, 2 Ves. Sen. 663.

But when she has a separate interest as co-plaintiff with her husband, or being a defendant answers jointly with him, instead of suing by her next friend, or answering separately, the suit or defence is considered that of the husband alone, and will not prejudice any future claim by the wife, *Hughes v. Evans*, 1 S. & S. 125; *Mole v. Smith*, 1 J. & W. 665.

By the Con. Stats. U. C. c. 78, s. 1, it is enacted that, "Every woman who has married since the 4th day of May, 1859, or who marries after this act takes effect, without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real and personal property, whether belonging to her before marriage or acquired by her by inheritance, devise, bequest, or gift, or as next of kin to an intestate, or in any other way after marriage, free from the debts and obligations of her husband and from his controul or disposition without her consent, in as full and ample a manner as if she continued sole and unmarried, any law, usage or custom to the contrary notwithstanding; but this clause shall not extend to any property received by a married woman from her husband during coverture."

And by sec. 2 it is provided that, "Every woman who on or before the 4th day of May, 1859, married without any marriage contract or settlement, shall and may, from and after the said 4th day of May, 1859, notwithstanding her coverture, have, hold and enjoy all her real estate not then, that is on the said 4th day of May, taken possession of by the husband, by himself or his tenants, and all her personal property not then reduced into the possession of her husband, whether belonging to her before marriage, or in any way acquired by her after marriage, free from his debts and obligations contracted after the said 4th day of May, 1859, and from his controul or disposition without her consent, in as full and ample a manner as if she were sole and unmarried; any law, usage or custom to the contrary notwithstanding."

The effect of this act seems to be that all property belonging to a married

woman and which was not actually reduced into the possession of her husband on the 4th of May, 1859, is her separate property and to be enjoyed by her as if settled to her separate use.

Where the suit relates to such property, the bill must be filed in the name of the wife, by her next friend, otherwise the defendant may take an objection for misjoinder of plaintiffs upon the ground, that she may at any future time institute a new suit for the same matter; and that upon such new suit being instituted, a decree in a cause over which the husband had the exclusive controul and authority, would not operate as a valid bar against her subsequent claim, *Wake v. Parker*, 2 Keen 59, and see *Warren v. Buck*, 4 Beav. 95, as to the time when the objection can be taken by the defendant. In practice the husband is sometimes made a co-plaintiff, but this is incorrect, and in all such cases she should sue, as sole plaintiff, by her next friend, and the husband should be made a party defendant, *Story's Eq. Pl.*, s. 63.

It is not necessary that the next friend of a married woman should be a relation, and the court will not demand security of him for costs, *Dowden v. Hook*, 8 Beav. 399; *Coulsting v. Coulsting*, 8 Beav. 463.

To authorize the filing of a bill by her next friend, her consent must be obtained, and if it is filed without her consent, it will be dismissed upon her affidavit of the matter, *Cooke v. Fryer*, 4 Beav. 13; unless she is an infant, when her consent is not necessary, *Wortham v. Pemberton*, 9 Jur. 291.

When the next friend of a married woman dies pending the suit, she may obtain an order to substitute a new one, and if she neglect to do so the defendant may move upon notice for an order that she do within a limited time name a next friend, or that the bill be dismissed with costs, *Barlee v. Barlee*, 1 S. & S. 100.

### 5. Infants,

Although for many purposes an infant is under legal incapacity and disabilities, yet a suit may be maintained either at law or in equity, for the assertion of his rights, or for the security of his property, and for this purpose a child has been considered to have commenced its existence as soon as it is conceived in the womb. Under such circumstances it is termed in law an infant *en ventre sa mere*, and a suit may be sustained on its behalf, and the court will, upon application in such suit, grant an injunction to restrain waste from being committed on his property, *Musgrave v. Parry*, 2 Vern. 710.

An infant may maintain a suit for the assertion of his rights, but he can do nothing which can bind himself to the performance of any act; therefore, where from the nature of the demand made by the infant it would follow that, if the relief sought were granted, the rules of mutuality would require something to be done on his part, such a suit cannot be maintained. Thus an infant cannot maintain a suit for the specific performance of a contract, because if a decree were to be made for a specific performance as prayed, on the part of the infant, the court has no power to compel him to

perform it on his part, either by paying the money or executing a conveyance, *Flight v. Bolland*, 4 Russ. 298.

Although an infant can in general maintain a suit, yet he is incapable of doing so without the assistance of some other person who may be responsible to the Court, for the propriety of the suit, and who may be liable for the costs. Such person is called his next friend, and if a bill be filed on behalf of an infant without a next friend, the defendant may move to have it dismissed with costs, to be paid by the solicitor. It is not necessary that the next friend should be a relation of the infant, and although an infant has a guardian assigned him by the Court, or appointed by will, yet where he is plaintiff, the course is not to call the guardian by that name, but to call him the next friend.

Any person being at liberty to institute a suit on behalf of an infant, it sometimes happens that two or more suits are instituted in his name, by different persons, each acting as his next friend; in such cases the Court will direct an inquiry as to which suit is most for his benefit, and upon that being ascertained will stay the proceedings in the other suit, and it is a motion of course that such a reference should be made. If upon the inquiry the second suit be deemed the more proper to be prosecuted, and the consequence is that there is one bill filed which it will be beneficial to prosecute, and a second bill filed which will be more beneficial, the ordinary practice is to stop the first suit, and to give costs to the next friend, *Starten v. Bartholomew*, 6 Beav. 145.

If it be represented that a cause preferred in the name of an infant is not for his benefit, the Court will order an enquiry concerning the propriety of the suit; and if upon such enquiry it is reported that the suit is not for the benefit of the infant, either the proceedings will be stayed, or else, if there be no excuse for the fact of the suit having been instituted, the bill will be dismissed with costs to be paid by the next friend, and where it appears upon affidavits that the suit was commenced by the next friend, not for the benefit of the infant, but to promote his own views the Court summarily and without an inquiry made such an order, *Salé v. Salé*, 1 Beav. 586; *Nalder v. Hawkins*, 2 M. & K. 243.

The reference as to the propriety of the suit will not be made on the application of the next friend himself, because the court considers that, in commencing a suit, the next friend undertakes on his own part, that the suit is for the benefit of the infant, *Jones v. Powell*, 2 Mer. 141. But this rule applies only to cases where an application is made for such inquiry in the cause itself; if there be another cause pending by which the infant's property is subject to the controul of the court, such an inquiry is not only permitted, but is highly proper, when fairly and *bona fide* made, and may have the effect of entitling the next friend to repayment of his costs out of the infant's estate, even though the suit should turn out unfortunate, and the bill be dismissed with costs, *Taner v. Ivie*, 2 Ves. Sen. 466.

Although an infant defendant, where his inheritance is concerned, has in general a day given him after attaining twenty-one, to show cause, if he



can, against the decree, an infant plaintiff has no such privilege, but is as much bound by a decree in a suit on his behalf, as one of full age, *Morrison v. Morrison*, 4 M. & C. 216; *Lord Brook v. Lord Hertford*, 2 P. Wms. 519.

A person having filed a bill as next friend of an infant, cannot withdraw himself and substitute another next friend without a reference to enquire whether it is for the benefit of the infant that such substitution should take place, *Melling v. Melling*, 4 Mad. 261; in general a next friend will not be allowed to retire without giving security for the costs already incurred.

When the next friend of an infant dies pending the suit, the proper course of proceeding is for the solicitor of the plaintiff to apply to the court for leave to appoint a new next friend in his stead; and after such appointment the name of the new next friend should be made use of in all the subsequent proceedings. If the plaintiff's solicitor omits to take the step within a reasonable time, the court will, upon motion or petition, approve of a new next friend, and notice of the order will be directed to be given to the plaintiff's solicitor, *Lancaster v. Thornton*, Amb. 398; *Bracey v. Sandiford*, 8 Mad. 468; and the proper order to move for, is that a new next friend may be appointed in chambers or by the master, not that the infant do name one, or the bill be dismissed, *Glover v. Webber*, 12 Sim. 351.

The next friend of any infant sole plaintiff, should not take any step in the cause, in the name of the plaintiff after the infant attains twenty-one, *Brown v. Weatherhead*, 4 Hare, 122; for the infant may on attaining his majority, abandon the suit. But if the infant adopt the proceedings after he comes of age, he becomes liable for all the costs of the suit.

### 1. The practice of setting down a cause on an objection for want of parties merely, is abolished.

In a specific performance suit, as a general rule, only the parties to the contract should be made parties, *Crooks v. Glenn*, 8 Grant 239. The execution debtor is a necessary party to a bill against the sheriff to compel conveyance of property sold under the execution, *Witham v. Smith*, 5 Grant 208.

In a suit against a mortgagor for foreclosure, the wife is not a necessary party if she has joined in the mortgage to bar her dower, and if made a party bill will be dismissed as against her with costs, *Moffatt v. Thompson*, 3 Grant 111; but if bill filed after mortgagor's death, the widow is a proper party, *Sanderson v. Caston*, 1 Grant 349; in suit against heirs of purchaser to enforce by sale vendor's lien, widow properly made a defendant, *Paine v. Chapman*, 7 Grant 179.

In a suit of foreclosure against the assignees of a bankrupt mortgagor, the bankrupt is not a necessary party, *Torrance v. Winterbottom*, 2 Grant 487; nor where mortgagor became bankrupt in England, *Goodhue v. Whitmore*, 7 U. C. L. J. 124.

Mortgagee who has been in possession, and who has assigned his interest

is not a necessary party to a bill of foreclosure, *Russell v. Robertson*, 5 U. C. L. J. 118; and see *Gooderham v. DeGrassi*, 2 Grant 185.

Heirs of a deceased mortgagee, not necessary parties to a bill of foreclosure by a prior mortgagee; the personal representative is a proper party, *Grimshaw v. Parks*, 6 U. C. L. J. 142.

Such executors who have proved, may file a bill without making others parties, though the latter may not have renounced, *Forsyth v. Drake*, 1 Grant 223; but where executor, who had renounced, was made a defendant, the bill was dismissed against him with costs, *Stinson v. Stinson*, 2 Grant 508.

2. It shall not be competent to any defendant in any suit to take any objection for want of parties to such suit, in any case to which the rules next hereinafter set forth extend. (*Imp. Act, 15 & 16 Vic. c. 86, s. 42.*)

**Rule 1.** Any residuary legatee, or next of kin, may have a decree for the administration of the personal estate of a deceased person, without serving the remaining residuary legatees or next of kin.

**Rule 2.** Any legatee interested in a legacy charged upon real estate; or any person interested in the proceeds of real estate directed to be sold, may have a decree for the administration of the estate of a deceased person, without serving any other legatee or person interested in the proceeds of the estate.

**Rule 3.** Any residuary devisee or heir, may have the like decree, without serving any co-residuary devisee or co-heir.

Where residuary devisees who had died abroad before the institution of the suit were made parties in ignorance of their death, the suit may be proceeded with without making their real representatives parties, *Bateman v. Cooke*, 1 W. R., 242.

**Rule 4.** Any one of several *cestuis que trust*, under any deed or instrument, may have a decree for the execution of the trusts of the deed or instrument, without serving any other of such *cestuis que trust*.

Decree for the appointment of new trustees and conveyance of the trust estate, in a suit by some of the *cestuis que trust*, and a direction to serve the others with notice of the decree, *Jones v. James*, 9 Hare, App. 90.



Money recovered from a trustee in a suit by *cestui que trust* to repair breach of trust as to one share of the trust estate, *McLeod v. Annesley*, 16 Beav., 600. If the whole fund be not forthcoming, owing to a breach of trust, a party entitled to a moiety, although ascertained, cannot sue for payment without making the person entitled to the other moiety a party, *Lenaghan v. Smith*, 2 Phill., 301; *Munch v. Cockerill*, 8 Sim., 219. Where *cestuis que trust* by their conduct have made themselves trustees, they ought to be parties, *Jesse v. Bennett*, 6 DeG. M. & G., 609. Strangers who have aided in misapplying funds, held to be properly made parties, *Lund v. Blanchard*, 4 Hare, 9.

**Rule 5.** In all cases of suits for the protection of property pending litigation, and in all cases in the nature of *waste*, one person may move on behalf of himself, and of all persons having the same interest.

**Rule 6.** Any executor, administrator, or trustee, may obtain a decree against any one legatee, next of kin, or *cestui que trust*, for the administration of the estate, or the execution of the trusts.

Before this rule a trustee might file a bill against one of several *cestuis que trust*, to recover the trust securities without making the other *cestuis que trust* parties, *Bridget v. Hames*, 1 Coll., 77.

In all the above cases the court, if it shall see fit, may require any other persons to be made a party or parties to the suit, and may if it shall see fit, give the conduct of the suit to such person as it may deem proper; and may make such order in any particular case as it may deem just for placing the defendant on record on the same footing in regard to costs as other parties having a common interest with him in the matter in question.

In all the above cases, the persons who, according to the practice of the court, would be necessary parties to the suit, are to be served with an office copy of the decree, and after such service, they shall be bound by the proceedings in the same manner as if they had been originally made parties to the suit; and upon service of notice upon the plaintiff, they may attend the proceedings under the decree, any party so served may apply to the court

to vary or add to the decree, within fourteen days from the date of such service.

This rule as to serving parties applies to infants, *Clarke v. Clarke*, 20 L. T. 88; and to parties out of the jurisdiction, *Chalmers v. Lawrie*, 10 Hare, App. 27.

By the endorsement to be made on the office copy of the decree served <sup>Dec. 9, 10</sup> (see Ord. 34, s. 6), the person served is notified that he must attend, or <sup>14<sup>th</sup> April 1867</sup> proceedings may be taken in his absence, and no order for leave to attend is necessary.

**Rule 7.** In all suits concerning real or personal estate which is vested in trustees under a will, settlement or otherwise, such trustees shall represent the persons beneficially interested under the trust in the same manner and to the same extent as the executors or administrators in suits concerning personal estate represent the persons beneficially interested in such personal estate; and in such case it shall not be necessary to make the persons beneficially interested under the trusts parties to the suit; but, on the hearing, the court, if it shall think fit, may order such person or persons, or any of them, to be made parties.

The operation of this rule is not confined to administration suits, *Fowler v. Bayldon*, 9 Hare, App. 78. But in applying it generally, the court will exercise the discretion given by the concluding clause, *Tudor v. Morris*, 22 L. J. Chan. 1051. As to the distinction between infant and adult *cestui que trusts*, vide *Goldsmid v. Stonehewer*, 17 Jur. 199; 9 Hare, App. 38. The rule does not apply where the trustees have disclaimed, *Young v. Ward*, 10 Hare, App. 58.

If the bill be filed to set aside a settlement, the trustees do not sufficiently represent their *cestui que trust*, *Reed v. Prest*, 1 K. & J. 183; *Rogers v. Rogers*, 2 Grant 137; *Thomas v. Torrance*, Cham. R. 46; or, where bill is against trustees by parties claiming adversely to *cestui que trusts*, *Cleveland v. McDonald*, 1 Grant 415.

Executors with power of sale are within this section, *Shaw v. Hardingham*, 2 W. R. 657; and devisees on trust subject to payment of debts, *Smith v. Andrews*, 4 W. R. 353.

In a suit to redeem, *cestuis que trust* of the mortgage money required to be parties, *Stansfield v. Hobson*, 16 Beav. 189. New trustees of a fund in court to whom it had not been assigned necessary parties to a suit by an encumbrancer of it, *Nelson v. Seaman*, 8 W. R. 167.

**Rule 8.** In all cases in which the plaintiff has a joint and several demand against several persons either as principals or sureties, it shall not be necessary to bring before the court, as parties to a suit concerning such demand, all the persons liable thereto; but the plaintiff may proceed against one or more of the persons severally liable. (*Eng. Con. Ord.* 7, r. 2.)

As to parties to a suit against trustees of a creditors' deed, see *Bateman v. Margerison*, 6 Hare 496. Where the owner of an equity of redemption assigns it in trust for the benefit of creditors, the creditors are not necessary parties to a bill of foreclosure, *Dalton v. McNider*, 1 U. C. L. J. 57; *Shaw v. Liddell*, *Ibid*; but the decree usually directs the master to notify some of the creditors of the proceedings in his office.

On a bill for redemption of property vested in trustees under an absolute deed intended as a mortgage, one of the trustees being beneficially interested; held, that the *cestui que trusts* were sufficiently represented, *Kerr v. Murray*, 6 Grant 348; on a bill by trustees to foreclose a mortgage made for the benefit of creditors, the creditors are not necessary parties, *Fraser v. Sutherland*, 2 Grant 442. A suit charging breach of trust cannot proceed in the absence of representatives of one of the trustees liable to contribute. *Devaynes v. Robinson*, 24 Beav. 86; and see *Shipton v. Rawlins*, 4 Hare 619.

See as to proceedings against some only of the parties to a breach of trust, *May v. Selby*, 1 Y. & C. Ch. 235; *Phillipson v. Gatty*, 6 Hare, 26; *Simes v. Eyre*, 6 Hare, 187; *Horsley v. Fawcett*, 11 Beav. 565; *Fowler v. Reynal*, 2 DeG. & S. 749.

This order applies to breaches of trust, *Kellaway v. Johnson*, 5 Beav. 319; *Perry v. Knott*, 5 Beav. 293; and to an information against public trustees, *Attorney General v. Pearson*, 2 Coll. 581; *Attorney General v. Corporation of Leicester*, 7 Beav. 176.

Where a surety files a bill to set aside a bond, the principal and co-surety are both necessary parties, *Allan v. Houlden*, 6 Beav. 148; sureties cannot be sued without their principals, *Pierson v. Barclay*, 2 DeG. & S. 746; but plaintiff may elect against which of two principals or which of two sureties he will proceed, *Lloyd v. Smith*, 7 Jur. 460; see *Wilson v. Goodman*, 4 Hare, 63.

Where a bill, besides charging surviving executor with breach of trust, seeks account of personal estate of testator, personal representatives of deceased executor must be parties, *Biggs v. Penn*, 9 Jur. 368; see remarks on this case, *Shipton v. Rawlins*, 4 Hare, 619. In an administration suit all persons liable must be parties, *Hall v. Austin*, 10 Jur. 452; but where two classes of trustees committed breach of trust *cestuis que trust* may proceed against one class only, *McGachen v. Dew*, 15 Beav. 84.

After a bill is filed against all the trustees it cannot, at the hearing, be dismissed by plaintiff against one of them, *Fussel v. Elwin*, 13 Jur. 333; and see *London Gas Co. v. Spottiswood*, 14 Beav. 264.

### VII.—SUBPŒNA TO APPEAR AND ANSWER.

The writ of subpœna to appear and answer a bill of complaint is hereby abolished.

### VIII.—APPEARANCE.

In future no appearance is to be entered in any suit, either by the defendant or by the plaintiff on his behalf.

### IX.—BILL OF COMPLAINT.

When redress is required by a subject in respect of any matter within the jurisdiction of the Court of Chancery, the suit is commenced by preferring a petition stating the plaintiff's case, and praying the relief to which he considers he is entitled, *Mitford's Eq. Pl. 7*; and this petition is called a bill.

If the suit be instituted on behalf of the Crown, or of those who partake of its prerogative, or whose rights are under its particular protection, the matter of complaint is offered to the Court by the proper officer by way of information, and not by petition, *Mitford's Eq. Pl. 7*; and the proceeding is then styled an information.

As a general rule every person may file a bill on his own behalf, if that be the proper remedy, but the matter in dispute must be of sufficient value to warrant the interference of the Court. To this rule there are two leading exceptions, the one of persons enjoying peculiar privileges, the other of persons laboring under disabilities.

Among the first class are the Crown, those who partake of its prerogative, or whose rights are under its protection, and foreign states; among the second class are, married women, infants, and those who labour under mental incapacity.

Where the rights of the Crown are immediately concerned, the Attorney-General proceeds to inform the Court upon his own authority, but if they are not immediately concerned he depends on the relation of some person whose name is inserted in the record, and who is called the relator, *Mitford's Eq. Pl. 22*. This person is answerable to the Court, and to the parties for the propriety of the proceedings, and the conduct of them, *Daniel's Ch. Pr. 18*; and he is liable for the costs, *Attorney-General v. Smart*, 1 Ves. Sen. 72. He cannot however, take any step in the cause in his own name, and independent of the Attorney General, *Attorney-General v. Wright*, 3 Beav. 447.

Sometimes the relator has an interest in the matter in dispute, and in that case his personal complaint being joined to the information by the

officer of the Crown, they form together and are termed an information and bill, *Daniel's Ch. Pr.* 13. They are however, in some respects treated as distinct proceedings, and the Court may dismiss the bill and retain the information, *Attorney-General v. Vivian*, 1 Russ. 226.

A foreign State may, if recognised by the government, institute a suit but it must be in the name of some public officer, entitled to represent the interest of the State, and upon whom process on the part of the defendant may be served, *The Columbian Government v. Rothschild*, 1 Sim. 104.

A suit respecting the rights of a married woman, other than those in her separate property, is brought by her and her husband jointly, and the bill is that of the husband, *Paulett v. Delaval*, 2 Ves. Sen. 666. But when she has a separate interest, as co plaintiff with her husband, or being a defendant answers jointly with him, instead of suing by her next friend, or answering separately, the suit or defence is considered as that of the husband alone, and will not prejudice any future claim by the wife, *Hughes v. Evans*, 1 S. & S. 185; *Mole v. Smith*, 1 J. & W. 665.

Where a married woman claims a right in respect of her separate estate, the bill should be filed in her name by her next friend, who need not be a relative. To authorize the filing of a bill by her next friend her consent must be obtained, *Cooke v. Fryer*, 4 Beav. 13; unless she is an infant when her consent is not necessary, *Wortham v. Pemberton*, 9 Jur. 291.

It is not necessary to name any next friend if the bill be filed to obtain a decree for alimony.

A suit by an infant is commenced by his next friend on his behalf, and if no next friend be named, the defendant may move to have the bill dismissed with costs to be paid by the solicitor, *Daniel's Ch. Pr.* 74.

1. A bill of complaint is to be in the form of a petition, addressed to the Chancellor. It must contain : (1.) The name and description of each party complainant. (2.) The name of each party defendant. (3.) A statement of the plaintiff's case in clear and concise language. (4.) A prayer for the specific relief to which the plaintiff supposes himself entitled; but the prayer for general relief may be added.

In the several cases enumerated in schedule A., hereunder written, the bill of complaint may be in the form, or to the effect, set forth in that schedule as applicable to the particular case; and, in cases not enumerated in that schedule, forms of pleading similar in principle may be adopted, whenever a more detailed statement is not necessary for the full development of the case.

A bill of complaint is not to contain any interrogatories ; all merely formal parts, except the address and conclusion, are to be omitted ; and the signature of counsel may be dispensed with.

Bills or petitions are not now addressed to the Chancellor, but to, "The Honourable the Judges of the Court of Chancery," *Ord.* 99.

The bill must be written in a plain, legible hand, divided into paragraphs, each of which must be confined as nearly as may be to a distinct portion of the subject ; the paragraphs must be numbered consecutively, and no costs are to be allowed for any bill which does not comply with these requirements, *Ord.* 64.

The plaintiff's abode and description must be stated accurately that the defendant may know where to resort to compel obedience to any order of the court, and to enforce payment of any costs awarded against the plaintiff. On a motion to take a bill off the files for irregularity, the description of the plaintiff being omitted, leave was given to amend on payment of costs, *Hill v. Maguire*, V. C. Esten, 7th Feb., 1882.

If the bill be filed by the next friend of an infant or married woman, his name, abode and description must be set forth, *Major v. Arnott*, 2 Jur. N. S. 80.

The forms of bills referred to in this section will be found in the appendix of forms.

2. A bill of complaint may be filed either with the registrar or with a deputy-registrar, at the option of the plaintiff ; and the filing of a bill of complaint shall have the same effect as the filing of a bill and the issuing of a subpoena to appear and answer now have ; and the service upon a defendant of a bill of complaint, with such endorsement thereon as is hereinafter provided, shall have the same effect as the service upon him of a writ of subpoena to appear and answer now has.

All the pleadings are to be filed in the same office as the bill, *Ord.* 44, ss. 2 and 3 ; but all affidavits in support of, or in opposition to any special motion or petition, must be filed with the registrar. *Ord.* 40 s. 2 ; this applies to affidavits on a motion for decree.

The name or firm and place of business of the solicitor or solicitors filing any bill must be endorsed thereon, and if the solicitor is acting as agent only, then the name or firm and place of business of the principal solicitor must also be endorsed, *Ord.* 43 s. 2.

The filing of a bill, or the taking of a proceeding, in which bill or proceeding any title or interest in land is brought in question, shall not be

deemed notice of the bill or proceeding to any person not a party thereto, until a certificate by the registrar or a deputy registrar of the court has been registered in the registry office of the county in which the land is situated; but no certificate is required to be registered of a suit or proceeding for the foreclosure of a registered mortgage, *Con. Stat. U. C.*, c. 12, sec. 64. As to *lis pendens*, see *Anon.*, 1 Vern. 318; *Bishop of Winchester v. Payne*, 14 Ves. 198; *Bellamy v. Sabine*, 1 DeG. & J. 566. To affect a man with a *lis pendens* there ought to be a continued prosecution, *Preston v. Tubbin*, 1 Vern. 286; *Kinsman v. Kinsman*, 9 L. J. Chan. 278.

As to effect of filing a bill in saving Statute of Limitations, see *Coppin v. Gray*, 2 Y. & C. Ch. 205; *Foster v. Thompson*, 4 Dru. & War. 308; *Boyd v. Higginson*, F. & K. 603; *Bampton v. Birchall*, 5 Beav. 67; *Dixon v. Gayfere*, 17 Beav. 421.

Where a certificate of *lis pendens* has been registered and the bill is afterwards dismissed, it is not necessary to obtain an order discharging the certificate of *lis pendens* from the registry; the registration of the decree dismissing the bill being sufficient for all purposes, *Dexter v. Cosford*, Cham. R. 22.

3. In lieu of serving a defendant with a subpœna to appear and answer, an office copy of the bill of complaint is to be served upon him, with an endorsement thereon in the form, or to the effect set forth in schedule B., hereunder written.

The endorsement will be found among the forms in the appendix.

For the form of endorsement upon office copies of bills for foreclosure of mortgages, or for sale, see *Ord.* 98.

4. Service of an office copy of a bill of complaint upon any defendant is to be effected in the same manner that service of a subpœna to appear and answer is now effected; but it shall not be necessary to produce the original bill. Affidavits of the service of an office copy of a bill of complaint are to be in the form or to the effect set forth in schedule C., hereunder written; they are to state where, when, and how such service was effected; but no copy of the bill is to be annexed.

It is not essential that the service should be personal, but it may be effected by leaving the office copy with a grown up person at the defendant's place of abode. The person so served must be an inmate of the house, *Edgson v. Edgson*, 3 DeG. & S. 629. If the service be not personal the



plaintiff cannot, in default of an answer, take the bill *pro confesso* by an order of course, but must serve the defendant personally with a notice of motion for such an order, *Ord. 13 s. 3*.

A solicitor may accept service on behalf of the defendant, and in that case it is not necessary to serve the defendant personally with a notice of motion for an order to take the bill *pro confesso*, but the usual two days notice must be served upon the solicitor, *Ross v. Hayes*, 6 Grant 277; but where the solicitor gave an undertaking to put in an answer, or in default that the plaintiff might proceed to take the bill *pro confesso* without further notice being given, the order was made on an *ex parte* application, *Peterborough v. Conger*, Cham. R. 18.

For the mode of effecting service upon corporations, see *Ord 54*.

5. Where a defendant in any suit is out of the jurisdiction of the court, then, upon application supported by such evidence as may satisfy the court, in what place or country such defendant is or may probably be found, the court may order that an office copy of the bill may be served on such defendant in such place or country, or within such limits as the court may think fit to direct.

Such order is to limit a time (depending on the place of service) within which such defendant is to answer or demur to the bill, or obtain from the court further time to make his defence to the bill.

When a defendant is resident out of the jurisdiction of the court he may be served with an office copy of the bill without any order permitting such service, *Con. Stat. U. C.*, c. 12, s. 71; but, until lately, if he failed to answer, no order *pro confesso* could be obtained against him until he had been served with an order limiting the time within which he was to answer or demur, so that in practice an order authorizing the service was always obtained before any steps were taken to effect it.

By a recent order of court the necessity of obtaining an order to serve out of the jurisdiction is done away with, *Ord. 101*; by that order the time is specified within which a defendant served at any of the different places mentioned is to answer or demur to a bill of complaint, and provision is made for swearing the affidavit of service abroad. Care must be taken when serving a defendant out of the jurisdiction to alter the endorsement on the office copy of the bill limiting the time within which he is to answer, so as to make it correspond with the time specified in the above order.

As the recent order provides that any party may apply for leave to serve any other party than a defendant by bill out of the jurisdiction under the above section, the following cases showing the nature of the evidence re-



quired by the court before granting an order to serve abroad, may not be out of place.

The application for such an order is made in chambers *ex parte*, and must be supported by affidavits shewing where the defendant resides. The affidavit should be made by some person who knows that the person proposed to be served is the defendant, that he is residing at the place alleged from having recently seen him there, or received letters from him dated at and bearing the post mark of the place and which shew that he is resident there. If the defendant's residence be proved by letters it must be shewn when the last communication was received from him, *Farry v. Davis*, Cham. R. 7; and if the affidavit merely states that letters have been received from the defendant dated at a particular place, and does not shew that he resides there, the order will be refused, *Kingston v. Monger*, Cham. R. 18.

It is usual to name in the order a particular place where service is to be effected, but this is not necessary as the court may order service not merely in a particular place, but within certain limits; as within the Grand Duchy of Baden, *Preston v. Dickenson*, 9 Jur. 919; and see *Blenkinsopp v. Blenkinsopp*, 8 Beav. 612; *Whitmore v. Ryan*, 4 Hare 612.

In fixing the time the court has regard to the facilities for communicating with the place where service is to be effected.

A copy of the order must be served along with the document, service of which is thereby authorised; and the person served must be identified with the defendant either by the affidavit of service or by a separate affidavit.

The court is very strict in the proof of identity required. A statement that the deponent served "the above named defendant," or that the person served admitted himself to be the defendant is insufficient; there must be clear and distinct proof of identity, and the deponent's means of knowing the fact must appear by the affidavit.

6. Orders for substitutional service of an office copy of a bill of complaint may be obtained in the same manner, and in such cases, as orders for substitutional service of a subpoena to appear and answer may be obtained under the present practice.

The principle on which orders for substitutional service are granted is, that there is a reasonable ground to believe that the service will come to the party's own knowledge. Thus, when a bill is filed to stay an action at law, and the plaintiff at law is out of the jurisdiction the plaintiff in equity is entitled to an order for service on the attorney in the action at law, *Sergison v. Beavan*, 22 L. J. Ch. 287; *Hamond v. Walker*, 3 Jur. N. S. 686; and to obtain such an order an affidavit of merits, or verifying the allegations in the bill, is not now necessary, *Smith's Ch. Pr.* 246, 749.

Where a defendant was out of the jurisdiction, but had himself commenced a suit in respect of the same property, to which the plaintiff was

not a party, the Court gave the plaintiff leave to substitute service on the solicitor who was acting for the defendant in his own suit, *Houkins v. Bennett*, 6 Jur. N. S. 948.

A motion for substituted service is usually *ex parte*, *Danford v. Cameron*, 8 Hare, 329; and a plaintiff moving upon notice may be ordered to pay costs, *Reed v. Barton*, 4 W. R. 793.

In every case of substituted service, leave must first be obtained, *Re Boyer*, 8 Jur. N. S. 930.

It must be shewn that the person on whom service is to be effected is the agent for the particular purposes of the suit, *Bones v. Angier*, 18 Jur. 1050; or at any rate for a purpose closely connected with the suit, *Passmore v. Nicholls*, 1 Grant, 130. His admission that he is agent is not sufficient, the fact must be proved, *Legge v. Winstanley*, 3 Grant, 106. An order obtained under this section does not authorise service on the agent of a notice of motion to take the bill *pro confesso*, as he may in the meantime have ceased to be agent, and a further order must be got.

The order allowing substitutional service, should be shewn to the person served, *Jones v. Brandon*, 2 Jur. N. S. 437; and should state a limited time within which the supposed agent may move to discharge it, *Allan v. Pyper*, 5 U. C. L. J. 118.

7. In case it appears to the court by sufficient evidence that any defendant against whom a bill has been filed has been within the jurisdiction of the court at some time not more than two years before the filing of the bill, and that such defendant after due diligence cannot be found to be served with an office copy of the bill, and that there is good reason to believe that he has absconded—in such case the court may order the defendant to answer within a time to be named in the order, and may direct a copy of such order, with a notice to the effect set forth in schedule D. hereunder written, to be published in such manner as the court may think fit; and in case the defendant does not answer or demur within the time limited by such order, the court, if it shall think fit, may order the bill to be taken *pro confesso* against such defendant, in the manner hereinafter provided.

The form of notice set forth in the schedule will be found in the appendix of forms. This section applies to suits of every nature, and the order to advertise under it is obtained on an *ex parte* application in Chambers.

It is not enough to state on affidavit that the defendant cannot, after due diligence, be found to be served, but the exertions made to find him must

be detailed, that the court may judge whether due diligence has been used, and whether he is absconding or not, *Murney v. Knapp*, Cham. R. 26; but it is not necessary to shew that he has absconded to avoid service in the particular suit, *Barton v. Whitcomb*, 16 Beav. 205.

When a defendant who cannot be found has any relatives in the country, they should be examined before a special examiner or deputy master as to their knowledge of his residence.

The court in some cases orders an office copy of the bill to be served upon one of the defendant's relatives, in addition to the publication of an advertisement.

The order usually directs the advertisement to be published once in each week for the four weeks preceding the day appointed for defendant to answer. In such an order the word week means any period of seven consecutive days, and not the particular seven commencing with Sunday. Where the last insertion of the advertisement was on a Tuesday, and the day appointed for answering was the Thursday week following, this was held not to be a sufficient compliance with the order, *Bazalgette v. Lowe*, 24 L. J. Chan. 368.

In moving to take a bill *pro confesso* against a defendant who has been advertised, it is necessary to shew by affidavit that he cannot be found to be served with notice of the motion, *Gilmour v. Matthew*, 3 Grant, 376. And to produce and shew to the judge the papers in which the advertisement has been inserted, *Goodfellow v. Hambly*, Cham. R. 62.

8. In case it appears to the court by sufficient evidence that any defendant against whom a bill of complaint has been filed for the foreclosure of a mortgage, or respecting the specific performance of any agreement, cannot be found after due diligence, to be served with an office copy of the bill of complaint, in such case the court may order the defendant to answer or demur within a time to be named in the order, and may direct a copy of such order together with a notice to the effect set forth in schedule D. hereunder written, to be published in such manner as the court may think fit; and in case the defendant does not answer or demur within the time limited by such order, the court, if it shall think fit, may order the bill to be taken *pro confesso* in the manner herein-after provided.

This section does not apply to any but foreclosure or specific performance suits, *Bank of Montreal v. Hatch*, Cham. R. 57.

By a recent order it is provided that, in case it is made to appear to the

court by sufficient evidence, that any defendant against whom a bill has been filed, has been within the jurisdiction of the court at some time, not more than two years before the filing of the bill, and that such defendant after due diligence, cannot be found to be served with an office copy of the bill, and that there is good reason to believe that he has absconded from the jurisdiction or that he is concealed within the same, the court may make such order as is prescribed by section 8 of the 9th general order of June, 1853, Ord. 72

For the mode of obtaining an order to advertise under this section, see notes to the preceeding one.

Schedule D. is the same as that mentioned in section 7.

9. Orders of course to amend bill of complaint may be obtained at any time before answer, upon precipe. (*Eng. Con. Ord. 9, r. 8.*)

Where plaintiff amends not requiring further answer, that should be stated in the order to amend, *Boddington v. Woodley*, 9 Sim. 380.

After the order is made and before service of it, the defendant may file a demurrer, *Price v. Webb*, 2 Hare, 515. Plaintiff is not by omitting to amend within the fourteen days, precluded from obtaining a fresh order, *Nicholson v. Peile*, 2 Beav. 497; and there may be any number of such orders before answer, *Wharton v. Swann*, 2 M. & K. 362.

10. Service upon any defendant of an order of course to amend before answer, may be dispensed with upon an application *ex parte*, when the court is satisfied that such an order may be made without prejudice to the defendant's rights; and when service upon any defendant of an order to amend has been dispensed with, the cause as to such defendant is to proceed as if the bill had been originally filed in the amended form.

11. An order to amend the bill only for the purpose of rectifying a clerical error in names, dates or sums, may be obtained at any time upon precipe. (*Eng. Con. Ord. 9, r. 9.*)

Leave given to amend a bill by striking out a defendant's maiden name without re-serving the bill, *Barnes v. Ridgway*, 1 Sm. & G. App. 18.

Amendments under this section render inoperative an order to take a bill, *pro confesso*, *Weightman v. Powell*, 2 DeG. & S. 570.

An order of course may be obtained after replication to amend by adding parties where no new issue is thereby tendered, *Brian v. Waistell*,

18 Jur. 446. Where the name of a deceased person erroneously made party by amendment was struck out by another amendment, the latter not within this rule, *Horsley v. Fawcett*, 10 Beav. 191.

12. One order of course to amend the bill, as the plaintiff may be advised, may be obtained by the plaintiff upon precipe, at any time before filing the replication, and within four weeks after the answer, or the last of several answers has been filed : but no further order of course for leave to amend the bill is to be granted after an answer has been filed, except in the case provided for by the 11th section of this order. (*Eng. Con. Ord.* 9, rr. 11, 12.)

Under the common order to amend the plaintiff cannot entirely change the nature of the bill, *Smith v. Smith*, Coop. 141 ; nor amend a bill for discovery, by praying relief, *Butterworth v. Bailey*, 15 Ves. 358.

The name of a defendant cannot be struck out after he has answered except upon payment of costs. The common form of order giving defendant leave to amend as he may be advised, does not authorise a plaintiff to strike out the name of a party on the record.

The name of a plaintiff may be struck out before answer under an order of course, but if any of the defendants have answered there must be a special application for leave to do so, as the defendant's security for costs is thereby lessened, *Fellows v. Deere*, 3 Beav. 353.

If one of several defendants has put in his answer, the plaintiff cannot have more than one order of course to amend, *Duncombe v. Lewis*, 10 Beav. 273 ; *Bainbrigg v. Baddelcy*, 12 Beav. 152 ; *Winthrop v. Murray*, 7 Hare, 150.

Adding a defendant is an amendment within this order, and any further order can be obtained only upon special application, *Attorney General v. Nethercoat*, 2 M. & C. 604. Amendment by order of course, after special order to amend irregular, *Edge v. Duke*, 10 Beav. 184. The irregular amendment of a bill is not a ground for taking it off the file, if it can be restored to its original state, *Attorney General v. Cooper*, 3 M. & C. 258.

The expression "the last of several answers," means the last of the several answers filed by several defendants, *Dalton v. Hayter*, 7 Beav. 586 ; *Lester v. Archdale*, 9 Beav. 156 ; and not the last answer filed at the time of applying for the order, *Arnold v. Arnold*, 9 Beav. 206 ; *Collett v. Preston*, 3 Mac. & G. 432.

An order to amend obtained, but not served, is no answer to a motion to dismiss, *Jones v. Lord Charlemont*, 12 Jur. 389 ; but an order to amend obtained and served after a defendant had given notice of motion to dismiss, held an answer to the motion, but plaintiff to pay the costs of the motion, *Peacock v. Sievier*, 5 Sim. 553 ; *Waller v. Pedlington*, 4 Beav. 124.

An enlargement of the time, for taking out an order to amend may be given, but solicitor's misconduct or inadvertence not a ground for allowing further time, *Clarke v. Mayor of Derby*, 10 Jur. 978.

If an order be made at the hearing for the cause to stand over with liberty to amend by adding proper parties, and apt words to charge them, or to shew that other persons are not necessary, the plaintiff cannot introduce any charge against the original defendants which is not necessary to explain the amendments, *Gibson v. Ingo*, 5 Hare 186; *Chisholm v. Sheldon*, 1 Grant 294. And he is not allowed, in addition to adding parties or co-plaintiffs, to introduce new statements and charges in the bill relating to such co-plaintiffs, *Hichens v. Congreve*, 1 Sim. 500; *Milligan v. Mitchell*, 1 M. & C. 433.

13. A plaintiff having obtained an order to amend his bill is to amend within fourteen days from the date of such order; otherwise the order to amend becomes void, and the case as to dismissal stands in the same situation as if such order had not been made.

This section applies to an amendment effected by special leave, *Cridland v. Lord De Mauley*, 2 DeG. & S. 560; and includes cases where liberty is given to amend upon the allowance of a demurrer, *Bainbrigge v. Baddeley*, 12 Beav. 152; *Armstead v. Durham*, 11 Beav. 428.

The plaintiff having submitted to a demurrer, obtained an order to amend, but did not do so within the time limited; he then obtained a second order of course to amend, and no answer being filed, a motion to discharge the second order was refused, *Nicholson v. Peile*, 2 Beav. 497.

When more than two folios of amendments are introduced at one place it is necessary to file a re-engrossment of the bill, but if the amendments are not so extensive, the original engrossment is altered in accordance with the amended draft, in a different coloured ink, and the registrar or deputy registrar writes in the margin of the first page "amended day of , under order dated ." When the order to amend is served on the defendant's solicitor, the plaintiff procures his office copy of the bill, and alters it so as to make it an exact copy of the amended record. New defendants added by amendment, or defendants who have not answered, are served with an office copy of the amended bill in the same manner as an original bill is served.

An order to amend avoids an order *pro confesso* previously obtained, unless on an *ex parte* application, the court gives leave to amend without prejudice to the order *pro confesso*, *Ord. 13 s. 8*; and it has this effect even if the amendment be to correct a clerical error, *Weightman v. Powell*, 12 Jur. 958.

After an injunction had been obtained by a sole plaintiff, and the bill amended by adding a co-plaintiff, it was held that the injunction was gone by the amendment, *Attorney General v. Marsh*, 16 Sim. 572; and making

an amendment pending a motion for an injunction, is an abandonment of the motion, *Monypenny v. Dering*, 1 W. R. 99; *Gouthwaite v. Rippon*, 1 Beav. 54.

If the bill be amended by adding parties after witnesses have been examined, the depositions of such witnesses cannot be read against the new parties, *Pratt v. Barber*, 1 Sim. 1.

14. Supplemental bills are abolished. When a suit is defective by means of some imperfection in the bill, and not in consequence of any event arising subsequent to its institution, the court may at any time permit an amendment of the bill in furtherance of justice, and on such terms as it may think proper, for the purpose of altering the allegations in the bill, or of putting new matter in issue, as well as for the purpose of adding or striking out the names of parties, or of varying the relief prayed, or praying further relief.

Such order is to be applied for by motion, the notice of which is to state the required amendment; and must be served upon the parties, or their solicitors, unless dispensed with.

Upon the motion the court must be satisfied, by affidavit or otherwise, of the truth of the proposed amendment, and of the propriety of permitting it to be made at the particular stage of the cause under all the circumstances.

Upon pronouncing such order for amendment, the court is to give such order as to the future conduct of the suit, in relation to answering such amendments, as also with regard to the evidence taken, or to be taken, and in all other respects, as the circumstances of the case may require.

A motion under this section is made in Chambers.

Every application for an order to amend made under this or the next section should be made promptly, and the affidavit on which it is founded must shew diligence, coextensive with the whole time from the filing of the answer, *Winnal v. Featherstonehaugh*, 10 Jur. 235; diligence in making the amendments, not in the general conduct of the cause is to be shewn, *Edge v. Duke*, 11 Jur. 213. An application to amend at a late



stage of the cause, will not be granted if it appear that such amendments will be attended with any risk of doing injustice, *Aitchison v. Coombe*, 6 Grant 648.

The affidavit must satisfy the judge of the necessity of the proposed amendment, *Bertolacci v. Johnstone*, 2 Hare, 632; and must state not merely that the amendment could not, with reasonable diligence, have been introduced, but facts shewing that, *Stuart v. Lloyd*, 3 M. & G. 181; *Collett v. Preston*, 15 Jur. 975.

The affidavit need not state all the amendments intended, but must state circumstances shewing their nature, *Payne v. Little*, 14 Jur. 358.

17. Bills of review are abolished. When the reversal of a decree is sought upon the ground of error apparent upon the face of the decree, that object may be attained by rehearing the cause, whether the decree has or has not been enrolled. One re-hearing may be had upon petition, signed by counsel, as in the case of an ordinary re-hearing, as well before as after the enrolment; but no petition for a second re-hearing is to be filed without leave of the court first had upon special motion for the purpose; provided that this order is not to be construed to authorise the re-hearing of a cause in the ordinary acceptance of the term after enrolment.

Every rehearing must be had within six months after the decree is passed and entered, or within such further time as the court or any judge thereof may allow, *Ord.* 96.

The amount to be deposited with the registrar on a petition of rehearing is ten pounds, *Ord.* 43, s. 7; but if the petition of rehearing be dismissed with costs the respondent is entitled to taxed costs, *Clarke v. Metcalf*, 21st Oct, 1862; but see *Price v. Dewhurst*, 4 M. & C. 282; *Phillips v. Phillips*, 8 Jur. N. S. 146.

18. Bills in the nature of bills of review; bills to impeach decrees on the ground of fraud, bills to suspend the operation of decrees; bills to carry decrees into operation, are abolished. Any party heretofore entitled to file a bill of review, praying the variation or reversal of a decree, upon the ground of matter arising subsequent to the decree, or subsequently discovered, or any description of bill by this order abolished, is to proceed by petition in the cause; this petition must pray the relief which is



*Miff. R. 4.*  
 sought, and must state the ground upon which it is claimed. The petition is to be verified by affidavit, and must be served upon the solicitors of all parties interested; and in case any such party has no solicitor, then upon such party; and where the reversal or variation of a decree is sought upon new matter, such proof as would have been requisite upon a motion to file a bill of review must be supplied. Upon the hearing of the petition, the court, in its discretion, may either make a final order, or direct the petition to stand over, with liberty to the parties interested in sustaining the decree to file a special answer to the same; and may make such order as to the production of further proof, and the manner thereof, and the further hearing of the petition, as the court may deem meet.

Bills of review were either bills for error of law apparent in the decree (which might be filed without leave), *Trulock v. Rodey*, 2 Phill. 395; (see observations on that case, *Green v. Jenkins*, 29 L. J. 505; 6 Jur. N. S. 515); *Perry v. Philips*, 17 Ves. 173; *Tommey v. White*, 1 H. L. Ca. 160; *Gould v. Tancred*, 2 Atk. 533; or where material evidence or facts were discovered which could not have been used when the decree passed, in which case leave to file the bill was necessary, *Young v. Keighly*, 16 Ves. 348; *Cooke v. Banfield*, 3 Swanst. 607; *Bennett v. Lee*, 2 Atk. 528; *Standish v. Radley*, 2 Atk. 177; *Hungate v. Gascoyne*, 2 Phill. 25. Such evidence or facts must not have come to the knowledge of the solicitor of the parties before the evidence closed in the former suit, *Norris v. LeNeve*, 3 Atk. 35.

To sustain a bill of review, the error must be specifically assigned; it must be an error conflicting with some legal, equitable or statutory rule, not a mere error in judgment, *Green v. Jenkins*, 6 Jur. N. S. 515. On a bill of review, the party could not assign for error that any matters were decreed contrary to the proofs in the case, he could shew only, error apparent in the decree, or newly discovered matter, *Mellish v. Williams*, 1 Vern. 166.

The petition filed under this section must be set down to be heard in court, and when it is ordered that any party may answer the petition, and that the petitioner may be at liberty to set down the petition again, it is to be set down in the same manner, and notice of the hearing is to be served, *Ord. 91, s. 1*; a memorandum provided by that order must be endorsed upon the copy for service of the order giving leave to answer the petition, *Ibid.*

19. No bill is to be filed for discovery merely, except in aid of the prosecution or defence of an action at law.

Since the passing of the C. L. P. Act, bills of discovery have become almost unknown, as discovery can, under that act, be obtained in the action at law.

### X.—PLEAS.

Pleas are abolished. All defences are to be presented to the court by demurrer or answer, or both, according to circumstances.

It is presumed a defendant may still by his answer avail himself of any defence, which he might have urged by plea under the old practice; only he must now submit that defence to the Court by way of answer.

### XI.—DEMURRERS.

A defendant may demur to a bill of complaint at any time within one month after service upon him of an office copy of the bill. Upon filing of a demurrer by a defendant, either party is at liberty to set the same down for argument immediately.

A demurrer is the proper mode of raising a defence, the grounds of which are apparent on the bill itself, either from matter contained in it, or from defect in its frame, or in the case made by it.

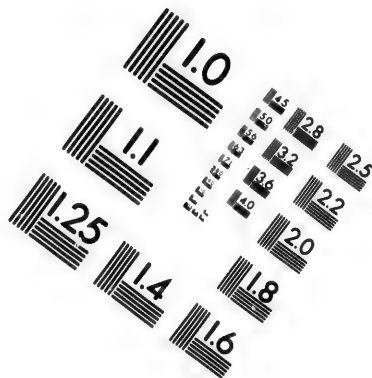
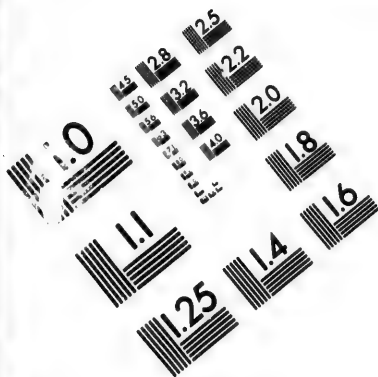
There is nothing in the above order to prevent a demurrer from being filed after the expiry of one month, any more than an answer, if the bill has not been taken *pro confesso*, but a defendant cannot obtain further time to demur.

A demurrer is not put in upon oath, but is filed in the same manner as an answer and notice of filing must be served on the same day, *Ord.* 19.

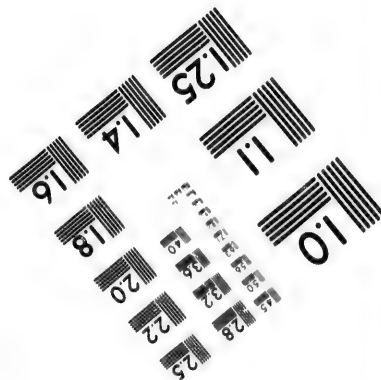
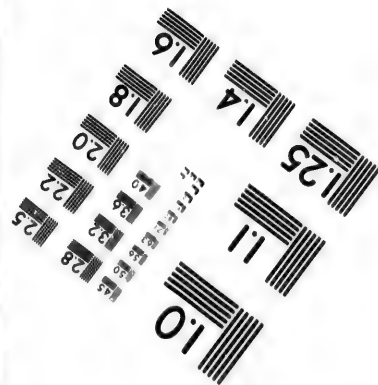
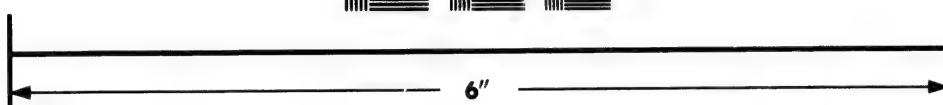
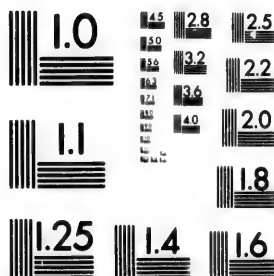
Notwithstanding the wording of the above order, the plaintiff is entitled to two clear days notice of the demurrer being filed, before the defendant can set it down for argument, unless the defendant is willing to waive his right to taxed costs; and a party who files and sets a demurrer down for argument before the expiry of the two days is held to have waived his right to taxed costs, *Baldwin v. Borst*, *Cham. R.* 82.

If the plaintiff on perusing the demurrer consider that it is good, and that he must amend his bill, he should at once obtain an order to amend and pay the defendant 20s. costs; and an order of course to amend without costs after demurrer is irregular, and will be discharged, *Martin v. Reid*, 6 U. C. L. J. 143.

A demurrer may be set down for argument on any Thursday, Friday, or Saturday, and two days notice of the hearing must be given. When it



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is called on for argument and the defendant fails to appear, the demurrer will be struck out of the paper, unless the plaintiff being the party who has set down the demurrer can produce proof of service of the notice of hearing, or if the demurrer be set down by the defendant, an affidavit proving service upon himself of the notice. If the plaintiff be provided with such an affidavit the demurrer is not necessarily overruled, but he must be heard in support of the bill, the affidavit of service not authorizing the Court in the absence of the defendant to overrule the demurrer, but only to hear the plaintiff, *Penfold v. Ramsbottom*, 1 Swanst. 552.

When the defendant appears but the plaintiff does not, the demurrer will be struck out of the paper unless he is prepared with similar affidavits, and upon production of such the defendant may have the demurrer allowed with costs, *Jennings v. Pearce*, 1 Ves. 447.

If a partial demurrer be allowed it generally imposes upon the plaintiff the necessity of amending his bill; thus upon the allowance of a demurrer for want of parties, the Court allowed the plaintiff to amend by striking out that part of the bill which rendered such parties necessary, *Attorney General v. Mayor, &c., of Poole*, 4 M. & C. 17. But where the Court sees that the frame of the bill is not such as entitles the plaintiff to relief against the demurring parties it will refuse leave to amend, *Tyler v. Bell*, 2 M. & C. 89.

If a demurrer be overruled the defendant cannot put in another demurrer without leave, *Bancroft v. Wardour*, 2 Bro. C. C. 66; but overruling demurrer to the original bill does not prevent the defendant from demurring to an amended bill, *Bosanquet v. Marsham*, 4 Sim. 578; *Cressy v. Bevan*, 13 Sim. 354.

After a demurrer has been overruled the defendant must ask for time, *Trim v. Baker*, 1 S. & S. 469; and the application for time should be made to the Court at the time the demurrer is overruled. A demurrer having been held good on one ground, though overruled as to the other, the defendant was allowed to answer without costs, *Paine v. Chapman*, 6 Grant 388.

A demurrer prevents the plaintiff from moving for an injunction, or to dismiss his bill until it is disposed of, but the pendency of a demurrer does not prevent the plaintiff from serving the defendant with a notice of motion, *Wardle v. Claxton*, 9 Sim. 412.

When a demurrer is filed the plaintiff is not entitled to an order to produce, pending the argument of the demurrer, *Reid v. Baldwin*, V. C. Esten, 22d Aug., 1861.

## XII.—ANSWER.

1. Answers may be in a form similar to a form set out in schedule E. to these orders. The signature of counsel is unnecessary; but the name of the party or solicitor who files the same is to be endorsed thereon, in conformi-

ty with the 2nd and 3rd sections of Order XLIII. The answer is to be verified by the oath of the defendant, and the jurat is to be in the form set forth in schedule E.

The answer is to consist of a clear and concise statement of such defence or defences as the defendant may desire to make.

The silence of the answer as to any statement of the bill is not to be construed into an implied admission of its truth; and any allegation introduced into an answer for the purpose of preventing such implied admission, is to be considered impertinent.

The answer must be written in a plain, legible hand, divided into paragraphs, numbered consecutively, and each paragraph must be confined as nearly as may be to a distinct portion of the subject, *Ord.* 64.

When the defendant is resident within the jurisdiction, the answer may be sworn before any commissioner duly authorized to take affidavits. It is his duty to forward the answer, when sworn, to the registrar or deputy registrar to be filed; and when the answer, after being sworn, comes into the hands of the defendant or his solicitor, it cannot be filed unless the opposite party consents to waive the irregularity.

To take the answer of a defendant resident abroad, it is necessary to sue out a Commission.

An answer sworn abroad without a Commission having issued to take it, is irregular, and cannot be filed, unless the plaintiff consents to its being filed without oath, *Crawford v. Polley*, Cham. R. 8.

The order for a Commission is obtained by motion upon notice, in chambers. As the plaintiff is entitled to join in the Commission, to see the answer sworn, two day's notice of striking commissioners names, with the names of those proposed, should be given him. If he do not name any, the defendant may sue out the commission addressed to his own commissioners, *Baron de Feucheres v. Dawes*, 5 Beav. 144.

Commissions to take answers are made returnable without delay; but this does not prevent the answer from being filed, although delay may have occurred, *Hughes v. Williams*, 5 Hare 211. Where the plaintiff joins in the commission he is entitled to six day's notice of executing it; the notice should be signed by the defendant's commissioners, and then served on those of the plaintiff.

As to the rule that a distinct denial in an answer of statements made in a bill, must be contradicted by two witnesses or by one witness corroborated by attendant circumstances, see *Boulton v. Robinson*, 4 Grant 109.

The name or firm and place of business of the solicitor filing an answer, must be endorsed thereon.

Notice of filing must be served on the plaintiff's solicitor on the same

day, *Ord. 19*; and this is important, as a defendant cannot move to dismiss for want of prosecution, unless prepared to prove service of notice of filing his answer, *Kay v. Sanson*, Cham. R. 71.

The form of an answer and of the jurat will be found in the appendix of forms.

2. A defendant who has been served with an office copy of a bill of complaint within the jurisdiction of the court, is to answer or demur to an original bill, or bill amended before answer, within one month after the service of the office copy of the bill or of the notice of the amendment of the bill, as the case may be; and a defendant who has been served with an office copy of a bill of complaint without the jurisdiction, is to answer or demur within the time limited by the order which authorises such service. Whenever a plaintiff amends his bill after answer, a defendant desiring to answer the same is to put in his answer thereto within seven days after notice of the amendment.

3. An answer may be filed without oath, or signature, by consent, without order.

4. When, in order to do complete justice, relief ought to be given to the defendant as well as to the plaintiff, or to the defendant alone, or to one of several defendants, the court, if it see fit, may frame its decree so as to attain that object, when the right of the defendant to relief grows out of the same transactions which form the subject matter of the bill; the facts necessary to make out the defendant's right to relief are to be stated in the answer as part of the defendant's case, and he is to pray such relief as he may think himself entitled to. This order is not to be considered as authorising a defendant to state in his answer any distinct or independant matters, not connected with, and growing out of the case made by the bill, as the foundation for relief; and the court, in all such cases, may either grant such relief upon the answer, or it may direct or permit a separate suit to be instituted.

5. The court may permit a supplemental answer to be

filed at any period of the suit, for the purpose of putting new matter in issue, in furtherance of justice, and upon such terms as may seem proper.

Leave to file a supplemental answer is to be applied for by motion. The notice of motion is to set forth the proposed answer, and to state the ground upon which the indulgence is asked. It is to be served upon the solicitors of all parties, unless dispensed with; and it must be supported by such evidence as shall satisfy the court of the propriety of permitting such supplemental answer to be filed, under all the circumstances, having reference to the subject matter of the answer, and to the stage of the cause in which the application is made.

When a defendant desires to correct, add to, or explain his answer after it is filed he will not be permitted to amend it, but he must apply for liberty to file a supplemental answer, *Jennings v. Merton College*, 8 Ves. 79; *Phelps v. Prothero*, 2 DeG. & S. 274. For the purpose of getting such leave a notice of motion is served, returnable in chambers, and supported by affidavit, *Wells v. Wood*, 10 Ves. 401; and the new facts intended to be introduced must be specified in the notice, *Haslar v. Hollis*, 2 Beav. 286; *Smith v. Hartley*, 5 Beav. 432.

The defendant is required to account for the mistake, to state the terms on which it is intended the answer should be filed, and to verify the truth of the proposed answer, *Bell v. Dunmore*, 7 Beav. 283; *Fulton v. Gilmour*, 8 Beav. 154; and the plaintiff has a right to see a full copy of the answer proposed to be filed before it is filed, *Fulton v. Gilmour*, 9 Jur. 1.

A supplemental answer is permitted only with great caution, *Curling v. Marquis of Townshend*, 19 Ves. 628; especially if the fact to be added is prejudicial to the plaintiff, or if the cause is in such a state that the other party may be prejudiced, but if it be beneficial to the plaintiff, leave is readily granted, *Greenwood v. Atkinson*, 4 Sim. 54; *Percival v. Caney*, 14 Jur. 473.

A defendant has been permitted to file a supplemental answer to correct a mistake in the original answer as to a matter of fact, *Fulton v. Gilmour*, 1 Phill. 522; where at the time of swearing to his answer he was ignorant of a particular fact, *Tidswell v. Bowyer*, 7 Sim. 64; *Frankland v. Overend*, 9 Sim. 365; or where, by the mistaken advice of his solicitor, he did not state a particular fact which he wished to have stated, *Nail v. Punter*, 4 Sim. 474; *Cherry v. Morton*, Cham. R. 25. Leave to plead the Statute of Limitations by supplemental answer after issue refused, *Percival v. Caney*, 14 Jur. 473; but leave has been given to file a supplemental answer for the purpose of pleading the Registry Act.



The supplemental answer will be confined strictly to the mistake clearly sworn to, and probable in itself, *Strange v. Collins*, 2 V. & B. 168; and leave will be refused unless a sufficient reason is given for not inserting it in the original answer, *Scott v. Carter*, 1 Y. & J. 452. Leave has sometimes been given even after replication filed and the cause set down for examination, *Cherry v. Morton*, Cham. R. 25; and to correct a date even after the cause was in the paper for hearing, *Fulton v. Gilmore*, 1 Phill. 522.

### XIII.—PRO CONFESSO—PRELIMINARY PROCEEDINGS.

1. Where any defendant, not appearing to be an infant, or a person of weak or unsound mind, unable of himself to defend the suit, *has been personally served within the jurisdiction of the court*, with an office copy of a bill of complaint, and has neglected to answer thereto within one month from the time of such service, the plaintiff, after the expiration of one month, and within two months from the date of such service, may apply to the registrar for an order to take the bill *pro confesso* against such defendant, and, no answer having been filed, the registrar is to draw up such order, upon precipe, on being satisfied by affidavit that an office copy of the bill of complaint *was served personally within the jurisdiction*; and after the expiration of such two months the plaintiff may apply to the court *ex parte* for an order to take the bill *pro confesso*, and the court being satisfied by affidavit that an office copy of the bill was served personally within the jurisdiction, and that no answer has been filed, may, if it think fit, order the same accordingly.

When the bill is filed in an outer country the order *pro confesso* after the expiration of one month and within two months, from the day of service, may be obtained from the deputy registrar.

If two months elapse the order is obtained in chambers on an *ex parte* application supported by the affidavit of service, and a certificate of the registrar or deputy registrar with whom the bill is filed, that no answer has been put in. If the bill be filed in Toronto, the certificate must bear date on the day of the motion; if in an outer country, at the latest possible moment.

An application for an order *pro confesso* cannot be made *ex parte* when more than six months from the service of the bill have elapsed, and notice of the motion must be served, *Brown v. Baker*, Cham. R. 7; but in com-

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putting the six months, the time of the long vacation is not reckoned, *Kerr v. Clemmow*, *Ibid* 14; *Grange v. Conroy*, *Ibid* 70.

An order to take the bill *pro confesso* against a defendant who at the time of the making of such order is an infant, or person of weak or unsound mind, unable of himself to defend the suit, is irregular and of no validity, *Ord*, 13 s. 5.

Before a bill can be taken *pro confesso* against a defendant a married woman, an order must be obtained for her to answer separate from her husband. This order may be obtained in chambers on the *ex parte* application of the plaintiff, but before the order will be granted it must be shewn that she has been served with an office copy of the bill, and is in default for want of answer, *Anon* Cham. R. 9; and where a solicitor had accepted service for the husband and wife, and had given a written consent that in the event of no answer being filed, the bill might be taken *pro confesso*; *held*, that this did not dispense with an order for the wife to answer separately, before proceeding to take the bill *pro confesso* as against her, *Sargeant v. Sharpe*, Cham. R. 68; and the time within which she is to answer must be expressed in the order. *Miller v. Gordon*, 5 Grant 184.

Where service of an office copy of a bill was made upon a Solicitor acting on behalf of several defendants, and he gave a written undertaking to answer but made default, the bill was ordered to be taken *pro confesso*, *Shaw v. Liddell*, 4 Grant 352, *Peterborough v. Conger*, Cham. R. 18.

Where the Attorney General being a defendant neglected to appear, the Court under the old practice refused to make an order compelling him to do so, but took it as a *nihil dicit*, *Barclay v. Russell*, 2 Dick, 729. The modern practice appears to be that where the Attorney General is a defendant and does not answer, the plaintiff should obtain an order that he do answer within a week, or in default that the bill be taken *pro confesso*, against him, *Groom v. Attorney-General*, 9 Sim. 325; *Shea v. Fellowes*, Cham. R. 30.

Where a defendant refused to attend before Commissioners appointed to take his evidence abroad, the usual order to set the cause down to be taken *pro confesso*, was made, *Printiss v. Bunker*, 4 Grant 147.

In suits for redemption or foreclosure of mortgage, or for sale, an order to take the bill *pro confesso* does not appear necessary now, as the plaintiff is to be entitled, on production to the registrar of the affidavit of service of the bill, to such a decree as would under the present practice be made by the Court, upon a hearing of a cause *pro confesso*, under an order obtained for that purpose, *Ord*, 98.

An order to amend, even a clerical error renders an order *pro confesso* inoperative, *Weightman v. Powell*, 2 DeG. & S. 570; 12 Jur. 978.

2. Where any defendant, not appearing to be an infant or a person of weak or unsound mind, unable of himself

to defend the suit, *has been personally served with an office copy of a bill of complaint out of the jurisdiction*, and such defendant has neglected to answer or demur thereto within the time limited by the order authorising such service, the plaintiff may apply to the court *ex parte* for an order to take the bill *pro confesso* against such defendant; and the court, being satisfied by affidavit that an office copy of the bill of complaint was served personally, and that no answer has been filed for such defendant, may, if it think fit, order the same accordingly.

The order to take the bill *pro confesso* under this section is obtained upon an *ex parte* application in chambers. Affidavits of the due service of the office copy bill, and the certificate of the registrar or deputy registrar that no answer is filed must be produced. These affidavits must clearly and distinctly identify the person served with the defendant, and should show the deponents sources of knowledge of the identity. They should shew that by the endorsement on the office copy of the bill the defendant was required to answer or demur within the time given him for so doing, by *Ord.* 101; and the affidavit should be sworn in manner pointed out by that order.

3. Where an office copy of a bill of complaint has been duly served, *but such service has not been personal*, and the defendant has neglected to answer or demur thereto within the time limited in that behalf the plaintiff may cause such defendant to be served personally, or by his solicitor, if he have one, with a notice of motion to be made on some day, not less than three weeks after the date of such service, that the bill may be taken *pro confesso* against such defendant; and thereupon, unless such defendant has in the meantime put in his answer to the same, the court, if it think fit, may order the bill to be taken *pro confesso*, either immediately, or at such time and upon such terms, and subject to such conditions, as the court, under the circumstances of the case, may think proper.

Where a Solicitor has accepted service of an office copy bill for the defendant, a two days' notice of motion is sufficient, and the notice may be

served upon the solicitor, *Ross v. Hayes*, 6 Grant 277; and see *Shaw v. Liddell*, 4 Grant 352.

When an office copy of the bill had been served on the solicitor of one of the defendants, who gave an undertaking to put in an answer, or in default that the plaintiff might proceed to take the bill *pro confesso* without further notice being given, the order was granted, *ex parte, Perterborough v. Conger*, Cham. R. 18.

Where after notice of motion is served, and before the motion day, the answer is filed, the plaintiff is entitled to his costs of the motion, *Anon.* 1 Grant 423.

4. Where an office copy of a bill of complaint has been duly served, *but such service has not been personal*, and the defendant has neglected to answer or demur thereto within the time limited in that behalf, then in case the office copy of the bill has been served upon such defendant out of the jurisdiction, or the plaintiff has been unable with due diligence to serve him personally with such notice of motion as is provided by the next preceding section of this order, in either case the court, upon the *ex parte* application of the plaintiff, may direct a notice of motion in the form or to the effect set forth in schedule G. to these orders appended, to be published in such manner as the court may think fit; and upon the hearing of such motion the court, being satisfied of the due publication of the notice, and that no answer has been filed, may order the bill to be taken *pro confesso*, either immediately, or at such time, and upon such conditions, as the court, under the circumstances of the case, may think proper.

The form of notice of motion referred to in this section will be found in the appendix of forms.

To obtain leave to publish such an advertisement, the same kind of evidence must be given, as is required to obtain an order for advertising an absent or absconding defendant, under *Ord. 9, ss. 7 & 8*.

On moving for the order *pro confesso*, the paper in which the advertisement was inserted must be produced to the judge, before the order will be granted, *Goodfellow v. Hambly*, Cham. R. 62.

It is a fatal omission in the advertisement on which an application to take the bill *pro confesso* is based, if the name of the particular defendant against whom the application is directed be omitted, *Jones v. Brandon*, 2 Jur. N. S. 437.

5. An order to take a bill *pro confesso* against a defendant who at the time of the making of such order is an infant, or person of weak or unsound mind, unable of himself to defend the suit, is irregular and of no validity.

In case it shall appear to the court that any defendant upon whom an office copy of a bill has been served is an infant, or a person of weak or unsound mind, not so found by inquisition, unable of himself to defend the suit, the court, upon the application of the plaintiff, at any time after bill filed, may order that one of the solicitors of the court be assigned guardian of such defendant, by whom he may answer the bill and defend the suit.

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Notice of the application must be served upon, or left at the dwelling house of the person with whom, or under whose care such defendant may be residing at the time of the motion, at least one week before the hearing of the application; and where such defendant is an infant, not residing with or under the care of his father or guardian, in that case notice of the application must also be served upon or left at the dwelling house of the father or guardian, unless the court at the time of hearing such application think fit to dispense with such service.

Notice should be served on, or left at the dwelling house of the person under whose care the defendant is, *Taylor v. Ansley*, 9 Jur. 1055; service on the head of a College of which the defendant was an under graduate, held good service, *Christie v. Cameron*, 4 W. R. 589. Where the infant is a married woman a guardian must be appointed, *Colman v. Northcote*, 2 Hare 147.

On moving to have a guardian *ad litem* appointed to a person of unsound mind, it must be shown that he has not been so found by inquisition, *Crawford v. Birdsall*, Cham. R. 70.

Where the lunatic has been so found by inquisition, the committee of his estate generally applies to be appointed guardian, to answer and defend the suit, which is ordered of course, 1 *Daniell's Chan. Pr.*, 145; but if he has no committee, or the committee has an adverse interest, a guardian will be appointed, *Houlett v. Wilbraham*, 5 Mad. 423; *Worth v. McKenzie*, 3 Mac. & G. 363.

Guardians *ad litem* for infants or persons of unsound mind made parties after the decree, or served with notice of motion under Order XV., are be appointed in the manner directed by this section, *Ord.* 53.

For the mode of proceeding where the infant desires to have a guardian appointed for him to defend a suit, see *Ord. 49*.

The motion for appointment of a guardian *ad litem* is made in chambers, *Ord. 34 s. 1*; but where the bill is filed in the office of a deputy registrar, he has power to hear and dispose of an application for that purpose, *Ord. 44 s. 4*.

6. Where the plaintiff has proceeded under either section 7 or 8 of Order IX., and the defendant has neglected to answer or demur to the bill within the time limited in that behalf, in either case the plaintiff may apply to the court, *ex parte*, for an order to take the bill *pro confesso* against such defendant; and the court being satisfied of the due publication of the order and notice in that behalf prescribed, may direct the bill to be taken *pro confesso* against such defendant, if it think fit, either immediately or at such time, and upon such terms, and subject to such conditions, as the court, under the circumstances of the case, may think proper.

Upon the application under this section, the Judge must be satisfied that the advertisement has been published in strict conformity with the requirements of the order authorizing such publication, and that no answer has been filed, the newspapers containing the advertisement must be produced, *Goodfellow v. Hambly*, Cham. R. 62; and it is necessary to shew that the defendant cannot be found to serve him with notice of motion, *Gilmour v. Matthew*, 4 Grant 376; *McCarty v. Wessels*, Cham. R. 5.

7. An order to take a bill *pro confesso* against a defendant does not require to be served; and all further proceedings in the case may be *ex parte* as to such defendant, unless the court order otherwise.

Where six years had elapsed after the order *pro confesso* was obtained, and no proceedings had been taken since, leave was given to the plaintiff to set the cause down for hearing, giving the defendant notice forthwith of the proceedings, *Cryne v. Doyle*, Cham. R. 1.

Where after a bill has been taken *pro confesso*, but before any decree is drawn up, the defendant intervenes and is a party to proceedings between the plaintiff and defendant, that is not such a case as is contemplated by the above section where all proceedings in the cause may be taken *ex parte*, *Strachan v. Murney*, 6 Grant 284.

8. A plaintiff may move *ex parte* for leave to amend the bill, without prejudice to an order to take the bill

*pro confesso* ; and where the court is satisfied that the rights of the defendant will not be prejudiced by such an order, it may direct the same accordingly.

Unless leave to amend is asked for and obtained under this section, the order *pro confesso* is discharged by the amendment, but it is so even though the amendment is only to correct a clerical error, *Weightman v. Powell*, 12 Jur. 958 ; and see *Thrasher v. Connolly*, 1 Grant 422.

Where the plaintiff had obtained an order *pro confesso* against one of the defendants, and afterwards applied to amend by adding parties without, prejudice, the motion was refused, *Herchmer v. Benson*, 1 Grant 92.

#### XIV.—PRO CONFESSO—HEARING DECREE.

1. Where a bill has been ordered to be taken *pro confesso* against all parties defendant, the cause may be set down to be heard at any time after the expiration of three weeks from the date of such order, unless the Court thinks fit to appoint a special day for the hearing thereof.

Cases are down to be heard *pro confesso* for any Tuesday, but three weeks must intervene between the date of the order *pro confesso*, and the day for which the cause is set down ; and the cause must be entered with the registrar, at least ten days before the day on which it is to be heard, *Ord.* 67.

Where an order to take the bill *pro confesso* had been obtained six years before, and no proceedings had since been taken to bring the cause to a hearing, leave was given to the plaintiff to set down the cause for hearing, giving the defendants further notice of the proceedings, *Cryne v. Doyle*, Cham. R. 1.

2. A defendant against whom an order to take a bill *pro confesso* has been made, is at liberty to appear at the hearing of the cause ; and if he waives all objection to the order, but not otherwise, he may be heard to argue the case upon the merits as stated in the bill, (*Eng. Con. Ord.* 22, r. 7.)

A defendant appearing under this section must waive all objections, *Greaves v. Greaves*, 12 Beav. 422 ; but he may shew that the bill is open to demurrer for want of equity, *Greig v. Green*, 6 Grant 240 ; 3 U. C. L. J. 218. Even though the defendant does not appear, the bill will be dismissed, if the plaintiff appears to have no equity, *Speidall v. Servis*, 2 Dick. 632 ; and the Court will not hear any affidavits against the bill as confessed ; the order *pro confesso* must first be set aside, *Manley v. Williams*, 5 U. C. L. J. 168.



3. Upon the hearing of a cause in which a bill has been ordered to be taken *pro confesso*, such a decree is to be made as the Court may think just ; and the decree so made is to be absolute in the following cases, viz :— (1.) When an office copy of the the bill has been served personally. (2.) When notice of motion to take the bill *pro confesso* has been served under the third section of the next preceding order. (3.) When the defendant has appeared at the hearing, and waived all objection to the order to take the bill *pro confesso*.

The plaintiff to obtain a decree must establish his right to the relief sought, *Lloyd v. Lloyd*, 4 Dr. & War. 354 ; *Stanley v. Bond*, 6 Beav. 420 ; plaintiff cannot take such a decree as he can abide by, but such as shall be just, *Collins v. Collyer*, 3 Beav. 600 ; *Haynes v. Ball*, 4 Beav. 101. ■

4. A decree founded on a bill taken *pro confesso* is to be passed and entered as other decrees, (*Eng. Con. Ord.* 22, r. 10.

It is essentially requisite to the perfect completion of every decree, that it should be passed and entered, *Drummond v. Anderson*, 3 Grant 150.

All proceedings under a decree or order before it is entered, are irregular, *Tolson v. Jervis*, 8 Beav. 364.

5. After a decree founded on a bill taken *pro confesso* has been passed and entered, if the decree be not absolute under section 3 of this order, an office copy thereof may be served on the defendant against whom the order to take the bill *pro confesso* has been made, or his solicitor, together with a notice to the effect that if such defendant desires permission to answer the plaintiff's bill and set aside the decree, application for that purpose must be made to the Court within the time specified in such notice, or that such defendant will be absolutely excluded from making such application. If such notice as aforesaid is to be served within the jurisdiction of the Court, the time therein specified for such application to be made by the defendant, is to be three weeks after service of such notice ; but if such notice is to be served out of the jurisdiction, the time is to be specially appoint-

ed by the Court upon the *ex parte* application of the plaintiff. (*Eng. Con. Ord.* 22, rr. 11 & 12.)

Where a bill was taken *pro confesso* against a trustee who had no interest, and resided abroad, service on him of the decree was dispensed with, *Benbow v. Davies*, 12 Beav. 421. Service on a defendant out of the jurisdiction of the order limiting the time within which he may apply to set aside the decree is a sufficient notice under this rule, *Trilly v. Keefe*, 16 Beav. 83; 16 Jur. 442.

6. When a decree is not absolute under sec. 3 of this order, the Court may order the same to be made absolute, on the motion of the plaintiff.—(1) After the expiration of three weeks from the service of a copy of the decree on a defendant, where the decree has been served within the jurisdiction. (2.) After the expiration of the time limited by the notice provided by section 5 of this order. (3.) After the expiration of three years from the date of the decree, where a defendant has not been served with a copy thereof; and such order may be made either on the first hearing of such motion, or on the expiration of any further time which the Court may allow to the defendant for presenting a petition for leave to answer the bill. (*Eng. Con. Ord.* 22, r. 15.)

Service of an order limiting the time within which defendant might apply to set aside a decree *pro confesso*, held sufficient notice for the purpose of making the decree absolute, *Trilly v. Keefe*, 16 Beav. 83; 16 Jur. 442. If the plaintiff cannot serve the defendant, he must at the end of three years, when he applies to make the decree absolute, explain why it has not been served; a previous application to dispense with service is premature, *James v. Rice*, 5 DeG. M. & G. 461.

The Court cannot dispense with service till the expiration of the three years, *Vaughan v. Rogers*, 11 Beav. 165.

7. Where the decree is not absolute under section 3 of this order, and has not been made absolute under section 5, and a defendant has a case upon the merits not appearing in the bill, he may apply to the court by petition, stating such case, and submitting to such terms with respect to costs and otherwise as the court may think reasonable, for leave to answer the bill; and the court,

being satisfied that such case is proper to be submitted to the judgment of the court, may, if it think fit, and upon such terms as may seem just, vacate the enrolment (if any) of the decree, and permit such defendant to answer the bill; and if permission be given to such defendant to answer the bill, leave may be given to file a separate replication to such answer, and issue may be joined, and witnesses examined, and such proceedings had as if the decree had not been made, and no proceedings against such defendant had been had in the cause. (*Eng. Con. Ord. 22, r. 16.*)

Permission given under this rule in a foreclosure suit on terms of paying plaintiff's costs of the application, and of the suit, *Inglis v. Campbell*, 2 W. R. 396.

8. A defendant waiving all objection to the order to take the bill *pro confesso*, and submitting to pay such costs as the court may direct, may have the case reheard upon the merits stated in the bill; the petition for rehearing being signed by counsel as other petitions for rehearing.

All rehearings of cases are to be within six months after the decree or decreetal order shall have been passed and entered; or within such further time as the Court or a Judge thereof may allow upon special grounds, *Ord. 96*; as to the rehearing terms, *Ord. 86*; length of notice of rehearing, *Ord. 92*; and as to the deposit necessary, *Ord. 43, s. 7*.

9. In pronouncing the decree the court, either upon the case stated in the bill, or upon that case and a petition presented by the plaintiff for the purpose, as the case may require, may order a receiver of the real and personal estate of the defendant against whom the bill has been ordered to be taken *pro confesso* to be appointed, with the usual directions, or direct a sequestration of such real and personal estate to be issued; and may, if it appears to be just, direct payment to be made out of such real and personal estate of such sum or sums of money as at the hearing or any subsequent step in the

cause the plaintiff may seem to be entitled to ; provided that, unless the decree be absolute, such payment is not to be directed without security being given by the plaintiff for restitution, if the court afterward think fit to order restitution to be made. (*Eng. Con. Ord. 22, r. 9.*)

The plaintiff's own bond held sufficient security for the restitution of property taken under a sequestration after bill taken *pro confesso*, *Lett v. Randall*, 7 Jur. 1075 ; for form of decree in such a case, see *Torr v. Torr*. Johns. 660.

10. The rights and liabilities of any plaintiff or defendant under a decree made upon a bill taken *pro confesso* extend to the representatives of any deceased plaintiff or defendant at the time when the decree was pronounced ; and with reference to the altered state of parties and any new interests acquired, the court may, upon motion, served in such manner and supported by such evidence as under the circumstances of the case the court deems sufficient, permit any party, or the representative of any party, to adopt such proceedings as the nature and circumstances of the case may require, for the purpose of having the decree (if absolute) duly executed, or for the purpose of having the matter of the decree and the rights of the parties duly ascertained and determined. (*Eng. Con. Ord. 22, r. 17.*)

**XV.—MOTION FOR A DECREE TO ADMINISTER THE ESTATE OF A DECEASED PERSON, WITHOUT BILL FILED.**

1. Any person claiming to be a creditor, or a specific, pecuniary, or residuary legatee, or the next of kin, or some one of the next of kin, or the heir, or a devisee interested under the will of any deceased person, may apply to the court upon motion, without bill filed or any other preliminary proceeding, for an order for the administration of the estate real or personal of such deceased person.

The notice of motion in such case is to be in the form or to the effect set forth in schedule H, hereunder written, and must be served upon the executor or administrator,

as the case may be, of such deceased person at least fourteen days before the day fixed for hearing the application.

Upon proof by affidavit of the due service of such notice of motion, or on the appearance in person, or by his solicitor or counsel, of such executor or administrator, and upon proof by affidavit of such other matter, if any, as the court may require; the court, if it think fit so to do, may make the usual order for the administration of the estate of the deceased, with such variations, if any, as the circumstances of the case may require, and the order so made shall have the force and effect of a decree to the like effect, made on the hearing of a cause between the same parties.

The court is to give any special directions touching the carriage or execution of any such order as, in its discretion, it may deem expedient; and in case of applications for any such order by two or more persons, or classes of persons, the court may grant the same to such one or more of the claimants, as it may think fit; and the carriage of the order may be subsequently given to such party interested, and upon such terms as the court may direct. (*Imp. Act, 15 & 16 V., c. 86, s. 45.*)

The proceedings under this order are intended for simple cases only, *Acaster v. Anderson*, 19 Beav. 161; *Rump v. Greenhill*, 20 Beav. 512; and where executors are charged with misconduct, a bill must be filed, *Re Babcock*, 8 Grant 409.

Executor is not chargeable with breach of trust in a suit by administration summons, but enquiries may be directed as to value of the property in question, *Re Delavante*, 6 Jur. N. S. 118; and an executor cannot be charged on admission of assets, *Re Wiltshire*, 8 W. R. 133.

On administration summons certificate reporting wilful default disallowed, *Blakeley v. Blakeley*, 1 Jur. N. S. 368; defendant not chargeable with wilful default, *Re Fryer*, 8 K. & J. 317; 26 L. J. Ch. 398; *Partington v. Reynolds*, 4 Jur. N. S. 200; *Harrison v. McGlashan*, 7 Grant 531.

Where in administration on summons a case of wilful default comes to light, a receiver and injunction may be granted for the protection of the property, *Brooker v. Brooker*, 3 Sm. & G. 475.

After an order made upon summons the court will stay an action at law against the executor, as after a decree obtained upon a bill, *Gardner v. Garrett*, 20 Beav. 469.

Administration may be ordered on summons, of effects bequeathed by a married woman under a power, *Sewell v. Ashley*, 3 DeG. M. & G. 983.

Executors having objected to pay into court a sum of money, on the ground that it had been paid to their solicitor for watching and protecting the interest of the estate upon claims of creditors brought into the Master's office; *held* that they were entitled to do so; as it is the duty of the executors to protect and look after the interest of the estate upon these enquiries, and this they do not strictly as accounting parties, but in virtue of their representative character, *Re Babcock*, 8 Grant 409.

After notice of motion served for an order to administer the estate of an intestate, a commission may be obtained for the examination of witnesses, with a view of establishing the fact that the party applying for the order is one of the next of kin of the intestate, *Furrell v. Cruikshank*, Cham. R. 12.

Notice of motion for an administration order having been served on the widow of the intestate as administratrix, the application was refused, there being no evidence produced that letters of administration had been granted to her, *Fowler v. Marshall*, Cham. R. 29.

A motion having been made, upon notice, for an administration order, the order not having been drawn up and no steps having been taken for four years, an application in chambers for a direction to the registrar to draw up the order, was refused, and new notice required to be served, *Re Forrester*, Cham. R. 29.

Where several suits are instituted for administration of a testator's estate, and a question arises as to their amalgamation, and the conduct of the cause, the preference will be given to a residuary legatee, or other person who has an interest in the residue, in preference to a creditor, *Penny v. Francis*, *Woodhatch v. Francis*, 7 Jur. N. S. 248.

2. An order for the administration of the estate of a deceased person may be obtained by his executor or administrator, as the case may be, and all the provisions of the first section of this order are to extend to applications by an executor or administrator under the present section.

Where the executor or administrator applies under this order, the court will direct an enquiry as to wilful default, *Ledgerwood v. Ledgerwood*, 7 Grant 584.

An executor or administrator has no right to file a bill merely to obtain an indemnity by passing his accounts under the decree of the court; there must be some real question to submit to the court, or some dispute requiring interposition, when he will be entitled to his costs; otherwise he will not receive them, *White v. Cummins*, 8 Grant 602.

3. The costs attending the administration of the estate of a deceased person under the preceding sections of this

order, are to be borne by such estate, unless the court shall direct otherwise.

Where in an administration suit the whole of the real and personal estate of the intestate was insufficient to pay the creditors, the heir at law and administratrix were allowed their costs as between solicitor and client, *Tordrew v. Howell*, *Parry v. Howell*, 7 Jur. N. S. 937; 9 W. R. 296.

A party appealing from a decree in an administration suit successfully, was allowed the costs of the appeal out of the estate, *Menzies v. Ridley*, 2 Grant 544.

Costs ought to be given out of the estate, for those proceeding only which are commenced for the benefit of the estate, or which have in their result been of benefit, *Bartlett v. Wood*, 9 W. R. 817; see also as to costs, *Madison v. Chapman*, 1 J. & H. 470; *Barnewell v. Iremonger*, 1 Dr. & Sm. 255; *Sullivan v. Bevan*, 20 Beav. 399.

#### XVI.—MOTION FOR A DECREE AFTER TIME FOR ANSWERING HAS EXPIRED.

1. The plaintiff in any suit, at any time after the period allowed to the defendant for answering has expired, but before replication, may move the court for such decree or decretal order as he may think himself entitled to; and the plaintiff and defendant respectively may file affidavits in support of and in opposition to such motion, and may use the same at the hearing thereof; and when such motion is made after an answer filed in the cause, the answer, for the purpose of the motion, is to be treated as an affidavit.

Notice of the motion is to be served upon the defendant or defendants at least three weeks before the day fixed for the application.

Within ten days from the service of the notice the defendant must file his affidavits in answer.

Within six days after the expiration of such ten days the plaintiff is to file his affidavits in reply, and except so far as these affidavits are in reply, they are not to be regarded by the court, unless upon the hearing of the motion the court shall give the defendant leave to answer them; and in that case the costs of such affidavits, and of



the further affidavits consequent upon them, are to be paid by the plaintiff, unless the court order otherwise.

No further evidence, on either side, is to be used upon the hearing of such motion, without the leave of the court.

Upon hearing the application, the court, in its discretion, may either grant or refuse the motion, or may give such directions for the examination of either parties or witnesses, or for the making of further enquiries, as the circumstances of the case may require, and upon such terms as to costs as it may think right. (*Imp. Act, 15 & 16 Vic. c. 86, ss. 15 & 16; and Eng. Con. Ord. 33, rr. 4, 5, 6, 7, & 8.*)

This order, though not repealed, is of very limited application, as motions for decree are now permitted in only three classes of cases: 1st. Where there is no evidence; 2nd. Where the evidence consists only of documents, and such affidavits as are necessary to prove their execution or identity, without the necessity of any cross examination, and 3rdly. Where infants are concerned, and evidence is necessary only so far as they are concerned for the purpose of proving facts which are not disputed, *Ord. 68, s. 2*; but this latter order does not apply to cases in which the court would grant leave to serve short notice of motion for decree in order to prevent irreparable injury, *Ibid.*

Where notice of motion for a decree is given, the cause must be set down to be heard not less than ten days before the day for which such notice is given, *Ord. 68 s. 1.*

By consent the cause may to be heard before the expiry of the three weeks, *Loinsworth v. Rowley*, 10 Hare, App. 55.

All the affidavits upon which the notice of motion is founded must be filed before the notice is served, *Ord. 43, s. 2*; if any affidavits filed before the date of the notice of motion are to be read they should be specially mentioned in the notice, *Clement v. Griffith*, Coop. 470.

The answer of a defendant may be read against himself without notice, *Cousins v. Vasey*, 1 W. R. 161; *Dawkins v. Mortan*, 1 J. & H 339; but the defendant cannot read it, unless the plaintiff read part of it; plaintiff and defendant cannot read against each other the answer of another defendant without notice, *Stephens v. Heathcott*, 6 Jur. N. S. 312; and see, *Wright v. Edwards*, 7 W. R. 193.

The answer of a company which is not sworn, cannot be read as evidence, *Wadeer v. East India Co.*, 9 W. R. 251.

Witnesses may be examined orally if the names of the persons to be examined are appended to the notice, *Pellatt v. Nicholls*, 24 Beav. 298; and

a notice to cross-examine given after the time for filing affidavits in reply, is regular, *Bedwell v. Prudence*, 1 Dr. & Sm. 221.

A declaration of right may be made on a motion for decree, *Bernasconi v. Atkinson*, Seton on Decrees, 82 & 89; and the court has power to dismiss the bill, *Robinson v. Lowater*, 2 Eq. R. 1070; or to dismiss the motion with costs and leave the cause to come on for hearing, *Thomas v. Bernard*, 5 Jur. N. S. 31; *Warde v. Dickson*, 5 Jur. N. S. 698.

The court cannot make any other decree than that asked by the notice of motion, but on a motion for a decree, according to the prayer of the bill, the same relief may be granted as upon the hearing of the cause, *Norton v. Steinkopf*, 1 Kay. 45, App. 10.

The plaintiff having given notice of motion for decree, cannot abandon such proceeding and bring the cause to a hearing in the usual way, but must apply to the court for leave, *McLaughlan v. Whiteside*, 7 Grant 516.

#### XVII.—MOTION FOR A DECREE BEFORE THE TIME FOR ANSWERING HAS EXPIRED.

When it can be made to appear to the court that it will be conducive to the ends of justice to permit such notice of motion to be served before the time for answering the bill has expired, the plaintiff may apply to the court, *ex parte*, for that purpose, at any time after the bill has been filed, and the court, if it thinks fit, may order the same accordingly; and when such permission is granted, the court is to give such directions, as to the service of the notice of motion and the filing of the affidavits, as it may deem expedient.

Upon the hearing of the motion for a decree or decretal order, the court, in its discretion, may either grant or refuse the application, or may give such directions for the examination of either parties or witnesses, or for the making of further enquiries, or with respect to the further prosecution of the suit, as the circumstances of the case may require, and upon such terms as to costs as it may think right.

To induce the court to act under this order some special ground must be shewn, *Davidson v. McKillop*, 4 Grant 146.

#### XVIII.—JOINING ISSUE—REPLICATION.

1. No subpœna to rejoin is to be issued. One replication only is to be filed in the cause, unless the Court shall

order otherwise ; it is to be in the form set forth in schedule I, hereunder written, or as near thereto as circumstances admit and require ; and upon the filing of the replication the cause is to be deemed to be completely at issue. (*Eng. Con. Ord.* 17, r. 2.)

Where by error plaintiff has filed replication before all the defendants have answered, leave may be given (but only on notice of motion) to file a fresh replication, *Stinton v. Taylor*, 4 Hare. 608. After replication filed an order of course to amend is irregular, *Hitchcock v. Jaques*, 9 Beav. 192.

Where the plaintiff had set the cause down for examination and served notice without a replication being filed, leave to file one *nunc pro tunc* was given on payment of costs, *Beckett v. Rees*, 1 Grant 484.

The form of replication will be found in the appendix of forms.

2. When the plaintiff has not obtained an order to amend his bill, he is either to file his replication, or set down the cause to be heard on bill and answer, within one month after the filing of the last answer.

The "last answer" means the last answer of all the defendants, *Collett v. Preston*, 8 Mac. & Gor. 432 ; *Arnold v. Arnold*, 1 Phill. 805 ; *Forman v. Gray*, 9 Beav. 200 ; *Stinton v. Taylor*, 4 Hare. 608.

Serving a notice of motion for decree is a sufficient compliance with this, and also with the next section.

The time of the long vacation is not reckoned in the computation of the time allowed for filing replications, or setting down causes under this order, *Ord.* 5 s. 4.

3. When the plaintiff has obtained an order to amend his bill after answer, he is either to file his replication, or set down the cause to be heard on bill and answer, within the times following :—(1.) When the plaintiff amends his bill, and no answer is put in thereto, and no notice of an application for further time to answer is served within seven days after service of the notice of the amendment of the bill, the plaintiff, after the expiration of such seven days, but within fourteen days from the time of such service, is either to file his replication or set down the cause to be heard upon bill and answer ; otherwise any defendant may move to dismiss for want of prosecution. (2.) When the plaintiff amends his bill

after answer, and a defendant, within seven days after the service of the notice of the amendment of the bill, serves notice of an application for further time to answer the amendments, but such application is refused, the plaintiff is, within fourteen days after such refusal, either to file his replication, or to set down the cause to be heard on bill and answer; otherwise any defendant may move to dismiss the bill for want of prosecution. (3.) When a defendant puts in an answer to amendments, the plaintiff must either file his replication or set down the cause to be heard on bill and answer, within fourteen days after the filing of such answer, unless he obtain, in the meantime, an order for leave to amend the bill; otherwise any defendant may move to dismiss the bill for want of prosecution.

After a defendant has served a notice of motion to dismiss, the plaintiff files replication, obtains an order to amend, sets down the cause on bill and answer, or serves notice of motion for decree under Order 16, it will be an answer to the motion to dismiss, but the plaintiff must pay the defendant the costs of the notice, and if he does not tender these, the defendant may proceed with his motion to obtain the costs, *Lester v. Archdale*, 9 Beav. 156; *Findlay v. Lawrance*, 11 Jur. 705; *Hughes v. Lewis*, 8 W. R. 292.

### XIX.—FILING PLEADINGS—NOTICE.

When any party or solicitor causes an answer, demurrer or replication to be filed, he is to give notice thereof, on the same day, to the solicitor of the adverse party, or to the adverse party himself if he act in person. (*Eng. Con. Ord.* 3, r. 9.)

This is important, as the defendant cannot move to dismiss, unless he is prepared to prove the service of notice of his answer being filed, *Kay v. Sanson*, Cham. R. 71. In *Jones v. Jones*, 1 Jur. N. S., 863, this was held unnecessary, but the court has refused to act upon this case as rendering this order inoperative.

The omission to serve notice does not entitle the opposite party to treat the pleading as a nullity or as irregular, *Smith v. Muirhead*, 2 Grant 395.

Where a month elapsed between the filing of the replication and serving the notice, the replication was ordered to be taken off the files, *Johnson v.*

*Tucker*, 15 Sim. 599; but the proper course seems to be not to move to take it off the files, but to move to enlarge the time for taking the next step in the cause, *Wright v. Angle*, 6 Hare. 107; *Lloyd v. Solicitors Life Assurance Co.*, 8 W. R., 640. In this case V. C. Wood, to discourage the practice of such summary applications on a mere slip, refused to give any costs.

## XX.—EVIDENCE TO BE USED AT THE HEARING.

1. Either plaintiff or defendant may at any time after answer, or when the application is on behalf of the plaintiff, after the time for answering has expired, obtain an order of course upon precipe, requiring the adverse party to produce, within a time to be limited by the order, all deeds, papers, writings, and documents in his custody or power, relating to the matters in question in the cause, under oath, and to deposit the same with the registrar of the court, for the usual purposes. But neither plaintiff nor defendant is to be held bound to produce, in pursuance of such order, any deeds, papers, writings or documents, which a defendant now admitting the same by his answer to be in his custody or power would not be bound to produce.

An order obtained by a defendant before he has filed his answer, unless by special leave of the court is irregular and will be discharged. When a demurrer has been filed, the plaintiff is not entitled to an order to produce pending the argument of the demurrer, *Reid v. Baldwin*, V. C. Esten. 22nd August, 1861.

A defendant is not entitled to an order for the production of documents by a co-defendant, *Attorney General v. Chapham*, 10 Hare, App. 68; *Wynne v. Humberston*, 5 Jur. N. S. 5; but after decree defendant can compel production by a co-defendant, *Hart v. Montefiore*, 10 W. R., 97. The usual time limited by the order is four days, and it is not necessary to serve the defendant personally; service on his solicitor is sufficient.

If the order be not obeyed, the party requiring production, may, upon producing the order with proof of service, and the certificate of the registrar that it has not been complied with, obtain on an *ex parte* application in chambers an order *nisi* against the party in default. This order must be served personally and should be endorsed with the notice required by *Ord. 46, s. 6*. If this order be disobeyed also, an attachment will issue and the party refusing to produce may be committed to close custody under it for contempt.

As the order exempts from production all documents which a defendant

would not have been compelled to produce under the former practice, it is proper to consider what that practice was.

Under the former practice it was necessary before the plaintiff could obtain production, that the document of which production is sought, should be admitted by the defendant's answer to be in his possession.

Whatever discovery a defendant would have been bound to give by answer, with respect to documents in his possession, must now be furnished by the affidavit on production, and the ground upon which he relies to excuse production must be stated with the same particularity, *Nicholl v. Elliott*, 3 Grant 586.

Where the defendant alleged that the documents were in the possession of his solicitor, who claimed a lien on them, and that he could not obtain possession of them, production was ordered, *Rodick v. Gandell*, 10 Beav. 270; but see *Palmer v. Wright*, 10 Beav. 234.

Where the documents were in the possession of the defendant's solicitor, as solicitor for him and for other persons not before the court, production was refused, *Cridland v. Lord DeManley*, 18 Jur. 442; and the same as to documents in possession of an agent, for the defendant and other persons not parties to the cause, *Lopez v. Deacon*, 6 Beav. 254; *Airey v. Hall*, 12 Jur. 1043. Where a defendant admitted documents to be in his possession, subject to an undertaking to a third party not to part with the possession, production was ordered, *Penkethman v. White*, 2 W. R., 380.

If it clearly appear that the documents do not relate to the plaintiff's title, the court will not order production; but to protect them from production by the defendant, it is not sufficient that the documents are evidence of his title, they must contain no matter supporting the plaintiff's title or case, or impeaching the defence, *Combe v. Corp. of London*, 1 Y. & C. 681; *Marquis of Bute v. Glamorganshire Canal Co.*, 1 Phill. 681; and there must be a positive averment to that effect; speaking as to information or belief is insufficient, *Harris v. Harris*, 4 Hare. 179; *Bannatyne v. Leader*, 10 Sim. 280; *Edwards v. Jones*, 9 Jur. 145. As a general rule a plaintiff in Equity is entitled to a discovery not only of that which constitutes his own title, but also of whatever is material to repel the case set up by the defendant, and as part of that discovery, to the production of such documents as are material for the same purpose, *Lawlor v. Murchison*, 3 Grant 553. A defendant is not bound to set forth a list of documents in his possession relating to his own title, *Sutherland v. Sutherland*, 17 Beav. 209.

As a general rule a party is not bound to produce documents which are to be considered as confidential communications made between solicitor and client, acting merely in the relation of solicitor and client, and which took place either in the progress of the suit, or with reference to the suit previous to its commencement, *Flight v. Robinson*, 8 Beav. 22; and see *Claggett v. Phillips*, 2 Y. & C. 82; *Follett v. Jefferyes*, 13 Jur. 972; *Manser v. Dix*, 1 K. & J. 451; and also *Bluck v. Galsworthy*, 7 Jur. N. S. 91; *Hamilton v. Street*, 1 Grant 827.

The communications of an agent, sent abroad by a solicitor to collect evidence in aid of an action, were protected as confidential, *Steele v. Stewart*, 13 Sim. 533; even though made before the litigation was commenced, *Lafone v. Falkland Co.*, 6 W. R. 4.

The opinion of counsel taken many years before the filing of the bill, for guidance in the dispute which afterwards became the subject of litigation, was held privileged, *Woods v. Woods*, 4 Hare, 83; *Reece v. Try*, 9 Beav. 316; *Beadon v. King*, 13 Jur. 550. The privilege does not extend to communications between co-defendants in reference to the suit, *Betts v. Mensies*, 5 W. R. 767.

A party is not protected from the production of documents on the ground that they may be used against him on an indictment for perjury, if the crime be alleged to have been committed after the suit commenced, *Price v. Gordon*, 7 Jur. 1076.

When books are in constant use by the party required to produce, the Court will order them to be inspected at his office, or at that of his solicitor, *Grans v. Cooper*, 4 M. & C. 263; and if they contain other entries not connected with the cause, such parts will be directed to be sealed up; but the party must make an affidavit of the fact, *Gerrard v. Penswick*, 1 Swanst. 535. If the plaintiff be entitled to the production of some, but not all the memoranda in a book, and they cannot be separated or sealed up, the defendant must produce the whole, *Carew v. White*, 5 Beav. 172.

Production will be enforced only when required for some purpose in the cause, and not for any collateral purpose; therefore an order to produce obtained after a decree on further directions was discharged, *Rippin v. Dolman*, 2 W. R. 432.

Under an order to produce the party requiring production is entitled not merely to have the documents produced but also to inspect them, and take copies. The solicitor or his clerk may inspect them, not merely the party himself, *Williams v. Prince of Wales Co.*, 23 Beav. 338; but the plaintiff cannot appoint a defendant as his agent for such inspection, *Bartley v. Bartley*, 16 Jur. 1062; neither will a relation, not professionally engaged in the suit, be permitted to inspect, *Summerfield v. Pritchard*, 17 Beav. 9; nor is the party entitled to publish any information acquired through the inspection, or to use it except for the purposes of the suit, *Williams v. Prince of Wales Co.*, 23 Beav. 338.

2. The affidavit to be made by a party who has been served with an order for the production of documents under the preceding section may be in the form or to the effect set forth in schedule K., hereunder written.

The form of affidavit on production, which is the same as that given in the English orders, will be found in the appendix of forms.



3. Any exhibit which according to the present practice of the court might have been proved *viva voce* at the hearing, may be proved by the affidavit of a witness who would have been competent to prove the same at the hearing; an order having been taken out for that purpose.

The order to prove exhibits by affidavit is obtained from the registrar upon precipe, and should be served upon the opposite party at least two clear days before the day of hearing. The document to be proved must be described in the order, and it is made "saving all just exceptions." If these words be omitted the Court will set the order aside.

It is not necessary that the order should be obtained before the date of swearing the affidavit, *Clare v. Wood*, 1 Hare, 814; *Hitchcock v. Carew*, 1 Kay, App. 14.

Nothing can be proved *viva voce* or under such an order, that requires more than the proof of handwriting, or that admits of cross-examination, *Lake v. Skinner*, 1 J. & W. 15; *Pomfret v. Windsor*, 2 Ves. 479; and a will cannot be proved at the hearing as a deed can, *Harris v. Ingleden*, 3 P. Wms, 98; nor a deed when the defendant by his answer alleges fraud in connection with the obtaining of it, *Barfield v. Kelly*, 4 Russ. 355.

Where the execution of a deed is not contradicted, but its validity only is disputed, it may be proved *viva voce* at the hearing, *Booth v. Cresswick*, 8 Jur. 323.

When a cause is set down for hearing upon bill and answer, exhibits may be proved at the hearing by affidavit, *Killaly v. Graham*, 2 Grant 361; *Neville v. Fitzgerald*, 2 Dr. & W. 530; *Chalk v. Raine*, 13 Jur. 981.

Where an instrument is produced upon notice by an adverse party who claims an interest in the cause under such instrument, the party calling for production is not bound to prove its execution, *Chisholm v. Sheldon*, 2 Grant 181.

4. Causes may be brought to a hearing upon evidence adduced upon affidavit by consent of parties: and where the evidence in a cause has been taken orally, affidavits of particular witnesses, or affidavits as to particular facts or circumstances, may be used by consent, or by leave of the court; and such consent to hear the cause upon affidavit evidence, or to admit the affidavits of particular witnesses, or affidavits as to particular facts and circumstances, may be given on behalf of married women, or infants, or other persons under disability, with the approbation of the court.

This section applies to suits in which replication is filed and which are brought to a hearing in the ordinary way, not to causes heard by way of motion for a decree under *Orders 16 & 17*.

5. Any witness who has made an affidavit filed by any party to a cause, *to be used at the hearing thereof*, is to be subject to oral cross-examination before the court or a deputy master, or an examiner specially appointed for that purpose, in the same manner as if the evidence given by him in his affidavit had been given by him orally; and such witness is to attend before the court, or deputy master, or examiner, as the case may be, upon being served with a writ of *subpœna ad testificandum* or *duces tecum*; and the expenses attending such cross-examination and re-examination are to be paid by the parties respectively in like manner as if the witness to be cross-examined were the witness of the party cross-examining, and are to be deemed costs in the cause of such parties respectively, unless the court think fit to direct otherwise.

Any party desiring to cross-examine a witness who has made an affidavit in any cause, *intended to be used at the hearing thereof*, is to give forty-eight hours' notice to the party on whose behalf such affidavit has been filed, or to the party intending to use the same, of the time and place of such intended cross-examination, in order that such party may, if he think fit, be present thereat. The re-examination of any such witness is to follow immediately upon the cross-examination, and is not to be delayed to any future time.

By a more recent order it is provided, that all examinations, out of examination term, of parties or witnesses, whether in a suit or any matter or otherwise are to be taken before a deputy master, or before a special examiner appointed for that purpose, unless the Court or a judge in chambers shall otherwise order upon application to be made for that purpose, which may be *ex parte*, but must be supported by affidavits setting forth the special grounds upon which it is made, *Ord. 55*.

Documents used on the examination of witnesses before an examiner must be properly marked by the officer, and referred to in the evidence.

otherwise they cannot be read at the hearing, *Hollywood v. Waters*, 6 Grant 329.

The examiner is not to judge what evidence is relevant or adverse, *Buckley v. Cooke*, 1 K. & J. 29. A defendant may cross-examine another defendants' witnesses, *Lord v. Colvin*, 3 Drew. 222.

The master is bound to allow a witness to be cross-examined on the whole case, without regard to his examination in chief; but in some cases he may exercise his discretion as to who should pay the fees of the examination, *Orandell v. Moon*, 6 U. C. L. J. 143. A solicitor cannot be compelled to produce his client for examination, *Spicer v. Dawson*, 22 Beav. 282; *Winthrop v. Elderton*, 1 W. R. 318.

A witness who is required to attend under this section is not entitled to forty-eight hours notice of such examination, but to such notice, whether more or less, as under the circumstances may be reasonable, *Re North Wheal Eamouth Mining Co.*, 8 Jur. N. S. 1168.

### XXI.—INTERROGATORIES.

No written interrogatories for the examination of either parties or witnesses, either before or after decree, are to be filed, except by leave of the court. Examinations are to be *viva voce*, and may be conducted either by the parties or by their solicitors or counsel.

Interrogatories are still permitted for the examination of witnesses out of the jurisdiction, under commissions.

### XXII.—EXAMINATION OF PARTIES.

1. Any party to a suit may be examined as a witness by the party adverse in point of interest, without any special order for that purpose; and may be compelled to attend and testify in the same manner, upon the same terms, and subject to the same rules of examination as any other witness, except as hereinafter provided. And any person for whose immediate benefit a suit is prosecuted, or defended, is to be regarded as a party for the purpose of this order. Provided always, that when it appears upon the hearing that any party examined under this order is united in interest with the examining party, the evidence so taken is not to be used on behalf of either the examining party or the examinant, but may be struck

out at the hearing at the instance of any party affected thereby.

It was decided that under the 14 and 15 Vic. c. 66, a party could not be examined as a witness on his own behalf, *Fuller v. Richmond*, 2 Grant 509; but the contrary was held by the Court of Queen's Bench, *Brennan v. Prentiss*, 9 U. C. Q. B. 372. In Chancery a party called and examined as a witness by the opposite party, cannot go on to give evidence on his own behalf; his counsel can only ask him questions in explanation of his evidence in chief. In this respect, the practice differs from that at Common Law, where a party called by the opposite party is allowed to give evidence on his own behalf, his interest going only to affect his credibility. The decisions of the Courts of Law on this subject are, however, contradictory. It has been held by the Court of Common Pleas, that a party called by the opposite party is thereby made a general witness, and his incapacity by reason of interest is removed, *Wickson v. Pinch*, 11 U. C. C. P. 146; while the Court of Queen's Bench held, (Burns J. dissenting) that he could be asked questions in explanation only, *Lamb v. Ward*, 18 U. C., Q. B. 304; *Mutual Fire Insurance Co. v. Palmer*, 20 U. C., Q. B. 441.

A vendor, having in consequence of disputes arising between him and his vendee, sold the same property to another purchaser, who had notice of the original contract, in a suit by the first against the vendor and second purchaser, for the specific performance of the contract, the vendor was offered as a witness on behalf of his co-defendant; held, that he was not a competent witness, under the circumstances, although he had parted with all interest in the property, *McDonald v. Jarvis*, 5 Grant, 568; and see *Monday v. Guyer*, 1 DeG. & S. 182; *Carrington v. Pell*, 3 DeG. & S. 512.

By Statute 16 Vic. c. 19, the wife of a party to a suit is not liable to be called as a witness by a party opposed to her husband, although her husband is, but if she consents to be so examined, no person affected by her evidence can object, *Peterborough v. Conger*, Cham. R. 85.

2. Any party defendant may be examined as a witness as heretofore, upon order for that purpose, on behalf either of the plaintiff, or of a co-defendant, upon points as to which the party to be examined is not interested. And any party plaintiff may be examined, under similar circumstances, by a co-plaintiff or by a defendant. Provided, that where any party having an interest has been examined under this order, such evidence is not to be used on behalf either of the examining party, or of the party examined, but may be struck out at the hearing, at the instance of any party affected thereby; but such

examination is not to preclude the court from making a decree, either for or against the party examined.

Since the passing of the above order the practice has been varied, and now any party defendant may be examined as a witness without order, on behalf either of the plaintiff or of a co-defendant—and any party plaintiff may be examined as a witness without order by a co-plaintiff, or by a defendant in cases where under the present practice such examination may be had upon the common order being obtained for that purpose, *Ord. 89.*

3. Evidence taken under the first section of this order may be rebutted by adverse testimony; and any party examined as therein provided, may be further examined, on his own behalf, in relation to any matter respecting which he has been examined in chief. And where one of several plaintiffs or defendants, who are joint contractors, or united in interest, have been so examined, any other plaintiff or defendant, so united in interest, may also be examined on his own behalf, or on behalf of those united with him in interest, to the same extent as the party actually examined. Provided nevertheless, that such explanatory examination must be proceeded with immediately after the examination in chief, and not at any future period, except by leave of the court.

4. Any party to the record who admits, upon his examination, that he has in his custody or power any deeds, papers, writings, or documents relating to the matters in question in the cause, is to produce the same for the inspection of the party examining him, upon the order of the court, or of the deputy master, or examiner, as the case may be, before whom he is examined, and for that purpose a reasonable time is to be allowed. Either party may appeal from the order of such deputy master, or examiner; and thereupon such deputy master, or examiner, is to certify under his hand the question raised and the order made thereon; and the costs of such appeal are to be in the discretion of the court. But no party shall be obliged to produce any deed, paper,

writing, or documents which would have been protected under the previous practice.

5. Any person refusing or neglecting to attend at the time and place appointed for his examination under the first section of this order may be punished as for a contempt; and the party who desires the examination, in addition to any other remedy to which he may be entitled, may apply to the court, upon motion, either to have the bill taken *pro confesso*, or to have it dismissed, according to circumstances; and the court, upon such application, may, if it think fit, order either that the bill be taken *pro confesso*, or that it be dismissed, as the case may be; and when, from the circumstances of the case, such order cannot be made consistently with the rights of other parties to the suit, then the court may make such order as to the enlarging the time for passing publication, or otherwise, as may seem just.

Where a defendant refused to attend before commissioners appointed to take his evidence abroad, an order to set the cause down to be taken *pro confesso* was made, *Prentiss v. Bunker*, 4 Grant 280.

6. When the examining party uses any portion of the evidence taken under the first section of this order, (but not otherwise,) then it shall be competent for those against whom it is used to put in the entire evidence so taken, as well that given in chief, as that in explanation.

7. Any party plaintiff examined under the first section of this order may be so examined at any time after answer; and any party defendant may be examined at any time after answer, or after the time for answering has expired, as the case may be; and such examination may be had without reference to the examination terms hereinafter established.

A defendant may be examined *viva voce* in support of a motion, notice of which has been given, although the time for answering has not expired, *McClenaghan v. Buchanan*, 7 Grant 92. The examination of a defendant under this order is a substitute for the discovery by answer; the depositions of the defendant, taken under this order may be read at the hearing, and

it is not necessary to call him as a witness at the examination of witnesses, *Proctor v. Grant*, 9 Grant 31; and the examination of a plaintiff by a defendant would be equally admissible at the hearing, *Ibid*.

After the cause has been set down for hearing, the plaintiff cannot examine the defendant upon his answer, per V. O. Esten, *Barton v. Lewis*, 3rd Feb. 1863.

#### XXIV.—DISMISSAL OF THE BILL FOR WANT OF PROSECUTION.

1. Any defendant may move the court, upon notice, that the bill may be dismissed with costs for want of prosecution, and the court may order the same accordingly in the following cases, viz: (1.) If the plaintiff, not having obtained an order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the cause to be heard on bill and answer, within one month after the answer, or the last of the answers has been filed; or (2.) If the plaintiff, not having obtained an order to enlarge the time, does not amend the bill within fourteen days after the date of the order for leave to amend; or (3.) If the plaintiff, not having obtained an order to enlarge the time, does not set down the cause to be heard, and serve a notice of hearing within one month after publication has passed.

If the plaintiff neglects to set the cause down to be heard within one month after publication has passed, any defendant may set the cause down, and serve notice of hearing on the parties to the cause, *Ord. 57*, s. 6.

2. Where the plaintiff has amended his bill, after answer, any defendant may move the court upon notice, that the bill may be dismissed with costs, for want of prosecution; if the plaintiff, not having obtained an order to enlarge the time, does not file the replication, or set down the cause to be heard on bill and answer, within the times following, viz:—(1.) Within fourteen days after service of the notice of the amendment of the bill, where no answer has been filed, and the defendant



has not obtained or applied for time to answer. (2.) Within fourteen days after the refusal of an application for further time, in cases where the defendant, desiring to answer, has not put in his answer within seven days after service of the notice of the amendment of the bill, and the application for further time has been refused. (3.) Within fourteen days after the filing of the answer, in cases where the defendant has put in an answer to the amendments, unless the plaintiff, within such fourteen days, has obtained leave to re-amend the bill.

In computing the time, the plaintiff is entitled until 12 o'clock at night of the last day, therefore a notice of motion served on that day is premature, and will be discharged with costs, *Preston v. Collett*, 20 L. J. 228; and if notice be given too early the defect is not cured by an accidental postponement of the motion, *LeGeneve v. Hannam*, 1 R. & M. 494. If the defendant be in contempt he cannot move, *Anon*, 15 Ves. 174.

The general rule is that each defendant is entitled to make the application independently and without any reference to the state of the proceedings as between the other defendants and the plaintiff, *Lester v. Archdale*, 9 Beav. 156; *Earl of Mornington v. Smith*, 9 Beav. 250; *Jones v. Morgan*, 12 Jur. 388. In this order the words "last answer" mean, not the answer of the last defendant, but the last answer of the particular defendant moving to dismiss, *Dalton v. Hayter*, 7 Beav. 586; *Sprye v. Reynell*, 10 Beav. 351. Thus one defendant may move though his co-defendants may not have put in their answers, *Lester v. Archdale*, 9 Beav. 156; but the court will not make the order if the plaintiff can shew that he has used due diligence to get in the answers of the other defendants. And it is not enough for the plaintiff to shew that the answers of the other defendants have not been filed, he must also shew that he has used due diligence to have them served, and to get in their answers, *Baldwin v. Damer*, 11 Jur. 728; *Stinton v. Taylor*, 4 Hare 608.

A defendant who is in a position to move to dismiss, cannot do so if a co-defendant appearing by the same solicitor has not filed his answer, *Winthorp v. Murray*, 7 Hare, 157; and see *Rees v. Jacques*, 1 Grant 352.

A motion to dismiss pending an order to amend is irregular, *Emerson v. Emerson*, 12 Jur. 973; but not where the order was that in default of amendment the bill should *ipso facto* stand dismissed, *Dobede v. Edwards*, 11 Sim. 464.

The plaintiff upon being served with notice of motion to dismiss after answer, and before the cause is at issue, should either file a replication and tender to the defendant the costs, or apply specially for leave to amend, *Findlay v. Lawrence*, 11 Jur. 705; or appear upon the motion and ask for such terms as the state of the cause may justify.

Where the plaintiff files replication before the motion is heard, the only order which the court will make is that he pay the costs of the motion *Corry v. Curleris*, 8 Beav. 606; and if the plaintiff in addition to replying tenders the costs of preparing and serving the notice of motion, the defendant should accept them, for if he bring on his motion he will be ordered to pay the costs of it, less the amount properly tendered to him, *Wright v. Angle*, 12 Jur. 34; *Piper v. Gittens*, 11 Sim. 282.

If liberty to amend be given on special application, after the notice to dismiss is served but before it is heard, the defendant may bring on his motion in respect of the costs, unless the plaintiff has tendered them, *Findlay v. Lawrence*, 11 Jur. 705. A motion to amend is no answer to a motion to dismiss for want of prosecution, *McNab v. Gwynne*, 1 Grant 127. The bill is rarely dismissed on the first motion unless there has been great delay, but the court usually accepts the plaintiff's undertaking to speed the cause. By giving this the plaintiff undertakes to go to examination at the next term, and to a hearing at the close of publication.

As a general rule the court will not on a motion to dismiss for want of prosecution, enter into the merits to determine whether the bill should be dismissed without costs, but will consider only the conduct of the parties to the cause in respect of its prosecution, *Stagg v. Knowles*, 3 Hare 241.

But under special circumstances, where it appeared inequitable that the defendant should either compel the plaintiff to proceed or submit to his bill being dismissed, the court has entered into the question, and dismissed the bill without costs, *Pinfold v. Pinfold*, 1081; *Godday v. Sleight*, 3 W. R. 87; *Sutton Harbour Co. v. Hitchens*, 15 Beav. 161; *Wright v. Barlow*, 5 DeG. & S. 43.

3. In every other case, where the plaintiff is delaying the suit unreasonably, any defendant may move the court, upon notice, that the bill may be dismissed with costs for want of prosecution, after the expiration of one month from the time of filing his answer, in case the plaintiff, not having obtained an order to enlarge the time, does not obtain and serve an order for leave to amend the bill, or does not file the replication, or set down the cause to be heard, on bill and answer, within such month; and upon the hearing of such motion, the court is to make such order for the dismissal of the bill, or for the expediting of the suit, or as to the costs, as under the circumstances of the case may seem just.

If the motion be made by one of several defendants, it is not enough for the plaintiff to shew that he has not got in the answers of the other defendants, he must also shew that he has used due diligence to have them ser-

ved and to get in the answers, or take the bill *pro confesso* against them, *Earl of Mornington v. Smith*, 9 Beav. 251; *Baldwin v. Damer*, 11 Jur. 723; *Stinton v. Taylor*, 4 Hare 608,

An injunction does not prevent a defendant from moving to dismiss for want of prosecution, *Day v. Snes*, 3 V. & B. 170; *James v. Blou*, 3 Swanst. 234; *Bliss v. Collins*, 2 Jur. 62. The court may grant the plaintiff further time, but it is usual to do so only on terms as to the future conduct of the suit. An information by the Attorney General cannot be dismissed for want of prosecution, it is his privilege to proceed in what way he thinks proper; but an information in his name by a relator is subject to be dismissed with costs for want of prosecution, *Daniel's Chan. Pr.* 20.

On moving to dismiss, the registrar's certificate must not merely shew what proceedings have been taken, it must state that no further proceedings have been had, *Thompson v. Buchanan*, 3 Grant 562.

4. In all cases where a person or party obtains an order from the court, or from a master, upon condition, and fails to perform or comply with such condition, he is to be considered to have waived or abandoned such order, as far as the same is beneficial to himself, and any other party or person interested in the matter, on the breach or non-performance of the condition, may either take such proceedings as the order in such case may warrant, or such proceedings as might have been taken if no such order had been made. (*Eng. Con. Ord.* 23, r. 22.)

#### XXVI.—LEGAL RIGHTS—HOW DECIDED.

In cases where according to the present practice the court is in the habit of refusing equitable relief until the party seeking such relief has established his legal title or right in a proceeding at law, the court will itself determine such title or right without requiring the party seeking such relief to proceed at law to establish the same; but the court may require the right or title to be established at law, whenever, in its discretion, it considers that course expedient.

The court may now also try an issue of fact without the intervention of a court of law, *Con. Stat. U. C.*, c. 12 s. 69. Where the court requires an action at law to be brought to establish the right or title of the party seeking relief, an application for a new trial must be made to the Court of

Law in which the action is brought, and not to the Court of Chancery, *Hope v. Hope*, 10 Beav. 581.

Where the claim of a creditor is disputed in an administration suit, the court cannot direct an action at law, but must try the whole question, *Baylis v. Watkins*, 8 Jur. N. S. 1165.

## XXVII.—INJUNCTION TO STAY PROCEEDINGS AT LAW.

1. No injunction to stay proceedings at law is to be granted, for default of an answer to the bill; but such injunction may be granted upon interlocutory application, in like manner as other special injunctions are granted.

Under this section the plaintiff is to have an injunction, not as of course, but only on an affidavit of merits, *Senior v. Pritchard*, 16 Beav. 473; *Mag-nay v. Mines Royal Co.*, 8 Drew. 130; and to entitle the plaintiff to the injunction, he must himself depose to the facts within his own knowledge, and that he believes the other statements on which he relies to be true, *Mollett v. Enequist*, 25 Beav. 609; but where the plaintiff is abroad, the affidavit may be made by his agent, *Whitelegg v. Whitelegg*, 1 Bro. C.C. 57; *Lord Byron v. Johnston*, 2 Mer. 29. Where plaintiff had replied at law to equitable pleas, injunction was refused, *Farebrother v. Welchman*, 8 Drew. 122; and where a defendant in an action at law filed a bill to restrain proceedings, alleging as grounds for relief, facts which, if they had been properly pleaded, would have afforded a good defence at law, the court, without enquiring as to the merits of the case, dismissed the bill, *Morrison v. McLean*, 7 Grant 167.

A notice of motion for injunction may be served at any time after the bill is filed; even before service of office copy bill.

A motion for injunction will be refused where the allegations and prayer of the bill have been framed for relief on other grounds than those upon which the application is founded, although the affidavits in support of the motion, contain sufficient to warrant the court in granting an injunction, *Ely v. Wilson*, 7 Grant 103.

A motion for injunction held abandoned by amending the bill pending the motion, *Monypenny v. Dering*, 1 W. R. 99; but see *Haues v. Bamford*, 9 Sim. 653.

Where a notice of motion for injunction is refused, the proper course is not to give the costs, as, if the suit fails, the plaintiff must pay the costs, and if it succeeds, the order at the hearing provides for the payment of them, *Carruthers v. Armour*, 7 Grant 34.

2. On any motion to obtain or dissolve a special injunction, affidavits may be used either to support or contradict the answer.

As to the filing of the affidavits and the mode of referring to them in the notice of motion, see *Ord 40*, s. 2, and notes.

On moving for an injunction *ex parte*, the affidavits, on which the application is founded, must set forth all the facts and circumstances material for the court to know, or the injunction will be dissolved: even although the party moving did not consider the circumstance material, *McMaster v. Callaway*, 6 Grant 577.

### XXVIII. DECREES MERELY DECLARATORY.

No suit is to be open to objection on the ground that a merely declaratory decree or order is sought thereby; but the court may make a binding declaration of right without granting consequential relief. (*Imp. Act*, 15 & 16 V., c. 86, s. 50.)

It has been held by L. J. Turner that the court has no power, under this order, to declare future rights, *Lady Langdale v. Briggs*, 2 Jur. N. S. 982; and the court has refused to make declarations as to the interests of parties entitled in reversion, *Garlick v. Lawson*, 10 Hare, App. 14; *Greenwood v. Sutherland*, *Ibid.* 12. Such declaration will not be made except where necessary for the administration of an estate or in order to grant relief, *Gosling v. Gosling*, 1 John. 270; *Fyfe v. Arbuthnot*, 1 DeG. & J. 408.

A plaintiff cannot have a prospective declaration guarding against a claim which may never be made, *Jackson v. Townley*, 1 Drew. 617; nor a decree declaratory of a merely legal right, *Trustees of Birkenhead Docks v. Laird*, 18 Jur. 883.

This order does not apply unless the plaintiff would be entitled to consequential relief if he chose to ask it, *Rooke v. Lord Kensington*, 2 K. & J. 753; *Bristow v. Whitmore*, 4 K. & J. 743; *Macklem v. Cummings*, 7 Grant 318; when a declaration is asked and also an injunction, such injunction is consequential relief, *Marsh v. Keith*, 1 Drew & Sm. 342; 9 W. R. 115.

### XXIX. PARTIAL DECREES.

When questions arise between parties (who are some only of those) interested in the property respecting which the question arises; or where the property in question is comprised with other property in the same settlement, will, or other instrument, the court may adjudicate on the questions arising between such parties, without making the other parties interested in the property respecting

which the question arises, or interested under the settlement, will, or other instrument, parties to the suit, and without requiring the whole trusts and purposes of the settlement, will, or instrument, to be executed under the direction of the court, and without taking the accounts of the trustees, or other accounting parties, or ascertaining the particulars or amount of the property touching which the question or questions have arisen; but when the court is of opinion that the application is fraudulent, or collusive, or that for some other reason the application ought not to be entertained, it may refuse to make the order prayed. (*Imp. Act, 15 & 16 V., c. 86, s. 51.*)

This order applies only when some of the persons interested in the question at issue, in every point of view, are before the court, *Swallow v. Binns*, 9 Hare, App. 47.

The court may direct the administration of one or more specific trusts created by an instrument, without directing the performance of all, *Parrell v. Hingston*, 3 Sm. & G. 337; *Prentice v. Prentice*, 10 Hare, App. 23.

A party will not be allowed to proceed with a case under this section by striking out of the record the names of some of the defendants (who are out of the jurisdiction), and proceeding without them, *Lanham v. Pirie*, 2 Jur. N. S. 1201.

A decree made under this order does not bind the absent parties, as Ord. 6, s. 2, does when notice of the decree has been served upon them, *Doddy v. Higgins*, 9 Hare, App. 32.

### XXX. DECREE MAY BE MADE IN THE ABSENCE OF A PERSONAL REPRESENTATIVE.

Where, in any suit or other proceeding before the court, it is made to appear that a deceased person who was interested in the matters in question has no legal personal representative, the court may either proceed in the absence of any person representing the estate of such deceased person, or may appoint some person to represent such estate for all the purposes of the suit or other proceedings, on such notice to such person or persons, if any, as the court may think fit, either specially, or by public advertisement; and the order so made, and any orders consequent thereon, shall bind the estate of such deceased

person in the same manner in every respect as if there had been a duly constituted legal personal representative of such person, and such legal personal representative had been a party to the suit or proceeding, and had duly appeared and submitted his rights and interests to the protection of the court. (*Imp. Act, 15 & 16 V., c. 86, s. 44.*)

To induce the court to act under this order, it is necessary that the interest of the deceased defendant in the matters in question in the suit should be of little consequence, and that there should be difficulty in obtaining representation to his estate, *Daniel's Chan. Pr.* 1158. This order does not apply where parties have a beneficial and substantial interest, but applies only to cases of more formal parties, *Sherwood v. Freeland*, 6 Grant 305.

Thus creditors under a trust deed for their benefit, may proceed against the trustees without a personal representative of the deceased debtor, the author of the trust, where no such representative exists and the estate is insolvent, *Chaffers v. Headlam*, 9 Hare, App. 46; *Davis v. Boulcott*, 1 Drew. & Sm. 28; and where one of the executors of the testatrix in the cause had died intestate and insolvent, and ineffectual attempts had been made to obtain representatives to him, the court allowed an administration suit to proceed in the absence of such representation, *Band v. Randle*, 2 W. R. 331.

As a general rule the court will incline to act under this order, when the next of kin expressly refuses to administer, *Haw v. Vickers*, 1 W. R. 242; *Tarrett v. Lloyd*, 2 Jur. N. S. 371; or pays no attention to a notice calling on him to administer, *Whiteaves v. Melville*, 5 W. R. 676; or where the interests of the deceased are identical with those of the plaintiff, *Cox v. Taylor*, 23 L. J. Ch. 910; *Long v. Storie*, Kay. App. 12.

This order does not apply when the personal representative would have active duties to perform, *Fowler v. Bayldon*, 9 Hare, App. 78; nor when he would represent interests adverse to the plaintiff, *Headden v. Emmott*, 22 L. T. 186; *Dean of Ely v. Gayford*, 16 Beav. 561; *Gibson v. Wills*, 21 Beav. 620; nor where the object of the suit is to administer the estate of the intestate, *Silver v. Stein*, 1 Drew. 295; *Grover v. Lane*, 16 Jur. 1061; *James v. Aston*, 2 Jur. N. S. 294.

Where the entire adverse interest is unrepresented, the court will not appoint a person to represent that interest, *Gibson v. Wills*, 21 Beav. 620; and it will not under this order appoint a person to receive a sum of money in court, payable to a deceased person, though the amount be small, *Rawlins v. McMahon*, 1 Drew. 225.

As to cases where a will has been proved abroad, see *Hewetson v. Todhunter*, 22 L. J. Ch. 76; *Sutherland v. De Virenné*, 2 Jur. N. S. 301; a defendant in an administration suit died abroad, his executors having proved his will at the place of his death, refused to prove it in England, an order was made for appointment of a representative of the deceased, *Bliss v.*



*Putnam*, 7 Jur. N. S. 12. A person cannot be appointed to represent an estate under this order, without his consent, *Princes of Wales Co. v. Palmer*, 25 Beav. 605.

The proper person to be appointed is the person who would be appointed administrator *ad litem*, *Dean of Ely v. Gayford*, 16 Beav. 561.

As to authority conferred by administration *ad litem*, see *Williams on Exors.* 488.

For the form of order under this order, see *Hele v. Lord Bezeley*, 15 Beav. 340; *Whittington v. Gooding*, 10 Hare, App. 29.

### XXXI.—MISJOINDER OF PLAINTIFFS.

No suit is to be dismissed by reason only of the misjoinder of persons as plaintiffs therein, but whenever it appears to the court that notwithstanding the conflict of interest in the co-plaintiffs, or the want of interest in some of the plaintiffs, or the existence of some ground of defence affecting some or one of the plaintiffs, the plaintiffs, or some or one of them, are or is entitled to relief, the court may grant such relief, and may modify the decree according to the special circumstances of the case; and for that purpose is to direct such amendments, if any, as may be necessary; and at the hearing, before such amendments are made, may treat any one or more of the plaintiffs as if he or they were defendant or defendants in the suit, and the remaining or other plaintiffs was or were the only plaintiff or plaintiffs on the record; and where there is a misjoinder of plaintiffs, and the plaintiff who has an interest has died, leaving a plaintiff on the record without any interest, the court may, at the hearing of the cause, order such an amendment of the record as may appear just, and proceed to a decision of the cause, if it shall see fit; and give such directions as to costs or otherwise as may appear just and expedient. (*Imp. Act*, 15 & 16 V. c. 86, s. 49.)

See as to misjoinder before this order, *Lambert v. Hutchinson*, 1 Beav. 277; *Eades v. Harris*, 1 Y. & C. Ch. 230.

This order applies to plaintiffs not named, as where a shareholder files a bill on behalf of himself and others, *Clement v. Bowes*, 1 Drew. 684; but not where full justice cannot be done to the defendant in the absence of the shareholders, *Williams v. Salmond*, 2 K. & J. 463.

As to misjoinder in a suit impeaching a settlement of accounts of an association, see *Stupart v. Arrowsmith*, 3 Sm. & G. 176.

Bill dismissed where one only of the plaintiffs had an interest to maintain the suit, and that interest was not claimed by the bill, *Barton v. Barton*, 3 K. & J. 512. As to misjoinder in a suit by some shareholders to recover money wrongfully paid to defendants and other shareholders, see *Williams v. Page*, 24 Beav. 102; as to parties to suits by shareholders generally, see *Carlisle v. South Eastern Railway*, 1 Mac. & Gor. 689.

### XXXII.—SUITS FOR FORECLOSURE AND REDEMPTION.

1. In any suit for the foreclosure of the equity of redemption in any mortgaged property, or for redemption, the mortgagor may be ordered to deliver up possession of the mortgaged premises upon the final order for foreclosure or for dismissal of the bill, as the case may be.

This section is now extended to "the mortgagor or other person entitled to the equity of redemption, being in possession of the premises foreclosed," *Ord.* 69.

The court will not make such an order against the tenants of the mortgagor or owner of the equity of redemption.

An order for delivery of possession will not be granted *ex parte*, but notice of motion must be served; even though the bill has been taken *pro confesso*.

After the final order for foreclosure an order for delivery of possession will be granted, although not asked for when the final order was obtained, *Lasier v. Ranney*, 7 Grant 828.

On moving to commit for contempt in not obeying such an order, it must be shewn that possession was demanded, *Nevieux v. Labadie*, Cham. R. 18.

This section refers only to mortgage cases, and does not apply where the bill in a suit for specific performance is dismissed at the hearing, *Mavety v. Montgomery*, Cham. R. 21.

2. In any suit for the foreclosure of the equity of redemption in any mortgaged property, the court, upon the request of the mortgagee, or of any subsequent incumbrancer, or of the mortgagor, or any person claiming under them respectively, may direct a sale of such property, instead of a foreclosure of such equity of redemption, on such terms as the court may think fit to direct, and, if the court so think fit, without previously determining the priorities of incumbrancers, or giving the usual or any time to redeem; but if such request be made by any such

subsequent incumbrancer, or by the mortgagor, or by any person claiming under them respectively, the court is not to direct any such sale without the consent of the mortgagee, or the persons claiming under him, unless the party making such request deposit in court a reasonable sum of money, to be fixed by the court, for the purpose of securing the performance of such terms as the court may think fit to impose. (*Imp. Act, 15 & 16 V. c. 86, s. 48.*)

Where after a mortgage being given, the equity of redemption is severed, so that different persons are entitled to redeem in respect of different parcels, these different persons must be made parties in a suit to foreclose the mortgage, *Buckley v. Wilson*, 8 Grant 566.

In cases in which the owners of the equity of redemption are numerous, the court may at the hearing or afterwards direct that the persons so interested may be made parties in the master's office; but such order can be made only when one or more of the parties interested in the equity of redemption are already before the court, *Ord. 70.*

Where portions of an estate under mortgage are conveyed away by the mortgagor, one day for payment of the amount will be given to all the persons interested in the equity of redemption, *Hill v. Forsyth*, 7 Grant 461.

When a defendant at the hearing asked a sale instead of foreclosure, and the decree directed a sale which proved abortive, on petition which stated that any further attempt to sell would be followed by the same result, an order was made for payment in a month after service, and in default, foreclosure, *Goodall v. Burrowes*, 7 Grant 449; *Henderson v. Richmond*, *Ibid.*

Where the prayer of the bill is in the alternative for either sale or foreclosure, the court will, at the instance of the plaintiff, make a decree for sale, and in the event of a sale failing to produce sufficient to cover the plaintiff's claim, order foreclosure, *Blackford v. Oliver*, 8 Grant 391.

Some special ground must be shown to induce the court to depart from the ordinary rule of allowing six months for redemption, *Rigney v. Fuller*, 4 Grant 198.

The amount to be deposited in court by a defendant asking a sale is £20, and he has fourteen days from the day of hearing within which to pay in the money, and if the deposit be not made within the fourteen days, the decree will be drawn up directing foreclosure.

The court decreed a sale instead of a foreclosure, without requiring any deposit, where it was considered beneficial to the interests of an infant defendant, *Bank of Upper Canada v. Scott*, 6 Grant 451; but now a sale is not granted to infants except on the usual terms; though in some cases a reference is directed to enquire whether a sale or foreclosure is most for their benefit.

In decrees of foreclosure against infant defendants, a day to shew cause, after attaining twenty-one, must be reserved to the defendants, *Mair v. Kerr*, 2 Grant 223; and the final order of foreclosure must also reserve a day to shew cause.

The court may now require, as a condition, that the party asking a sale, shall conduct the same at his own expense, dispensing in such case with a deposit, *Ord. 75*; but the defendant is not entitled to insist upon a sale instead of a foreclosure against the consent of the mortgagee, without paying in the usual deposit, upon his undertaking the conduct of the sale, *Taylor v. Walker*, 8 Grant 506.

3. Instead of foreclosure, the bill in any such suit may pray a sale of the mortgaged premises, and that any balance of the mortgage debt which may remain due after such sale may be paid by the mortgagor, and the same may be decreed accordingly.

The court will not make a personal order against the mortgagor under this section unless asked by the prayer of the bill.

Where the decree directs foreclosure, the court may, on default in payment, grant an order for sale without rehearing the cause, *Laslett v. Cliffe*, 2 Sm. & G. 278; overruling, *Girdlestone v. Lavender*, 9 Hare, App. 53; see also, *Wayn v. Lewis*, 22 L. J. Chan. 1051. But the court will not after a decree for sale, order a foreclosure without rehearing the cause, unless sale has proved abortive.

4. When any person is surety for the payment of a mortgage debt, such person may be made a party to any suit for the foreclosure of the equity of redemption of the mortgaged property, and the relief specified in the last section may be prayed against both the mortgagor and his surety, and the same may be decreed accordingly.

Where a mortgagee upon a transfer of the mortgage covenanted that if default were made in payment of the mortgage money, he would pay it; he is not a surety within the meaning of this section, *Clarke v. Beal*, 8 Grant 7; the contract in such a case, is a contract of guarantee, and must be the subject of an action against the assignor, *Ibid.*

5. When a suit has been instituted for the foreclosure of the equity of redemption in any mortgaged property for default in the payment of interest, or of an instalment of the principal, any defendant may move to dismiss such bill upon paying into court the amount then due for principal and interest, with costs.

Upon default in payment of any instalment of principal or interest, the mortgagee has a right to call in the whole amount secured by the mortgage, *Sparks v. Redhead*, 3 Grant 311; *Cameron v. McRae*, *Ibid*; but a mortgagee who holds several mortgages in fee on the same land, one of which is not due, cannot file a bill to foreclose that mortgage with the others, *Thibodo v. Collar*, 1 Grant 147.

When a defendant moves to stay proceedings under this section, the interest is to be calculated up to the last gale day, and not up to the time of making the application, *Strachan v. Murney*, 6 Grant 378.

6. When a suit has been instituted for the purpose and under the circumstances specified in the last section, any defendant may move to stay the proceedings in the suit, *after decree*, but before sale or final foreclosure, upon paying into court the amount then due for principal and interest, with costs. When an application is made to stay the proceedings under this section, the decree may afterwards be enforced, by order of the court, upon any subsequent default in the payment of any further instalment of the principal, or of the interest.

After payment under this section of what is due, it is irregular to take any further proceedings in the cause until another instalment falls due, *Carroll v. Hopkins*, 4 Grant 431; as to period up to which interest is to be computed, see note to preceding section.

Where a stay of proceedings has been ordered and default is made in payment of another instalment of interest, an order will be granted directing payment of the whole sum secured, with liberty to the defendant to pay the sum now actually payable, and directing a stay of proceedings on such payment being made, *Strachan v. Devlin*, Cham. R. 8.

7. When the cause is heard upon an order to take the bill *pro confesso*, in a suit for the foreclosure of the equity of redemption in any mortgage property, the plaintiff is to produce at the hearing:—(1.) The mortgage deed, and the assignments thereof, if any. (2.) An affidavit which is to state the amount advanced upon the security,—the amount paid, whether by receipt of rents or otherwise,—and the amount remaining due for principal and interest, distinguishing how much for principal and how much for interest. The affidavit is to state whether the mortgaged premises, or any part of them,

has been in the occupation of the mortgagee or of any one under whom he claims ; and, when there has been any such occupation, the affidavit is to state its nature,—the time it continued,—and the fair rentable value of the property. Upon production of such proofs and documents, the court may at once determine the amount due : and when a foreclosure is ordered, the time and place for the payment of the mortgage money may be fixed by the decree, without a reference to the master, or any further enquiry.

This order though not repealed is practically obsolete, as mortgage suits for foreclosure or sale are not now brought to a hearing, but the plaintiff is entitled on production to the registrar of the affidavit of service of the bill, to obtain on precipe such a decree as would be made by the court upon a hearing of the cause *pro confesso*, under an order obtained for that purpose, *Ord.* 98.

Where a sale is ordered, the judge at chambers, or the master acting in the matter, as the case may be, is to give such directions as he may think right for bringing in other incumbrancers ; and the matter is to proceed in other respects as in ordinary cases when a sale has been ordered.

8. Where a suit for foreclosure of the equity of redemption of any mortgaged property has been brought to a hearing in the ordinary way, neither the amount of the mortgage debt, nor the time and place of payment, are to be determined at the hearing, but the case is to be adjourned to chambers, or a reference to the master directed, as may be thought most convenient.

### XXXIII. REFERENCES TO THE MASTER.

1. In all cases where, according to the present practice, a reference to the master would be directed, the court may dispose of such matters itself, if it think fit, and may direct the proceedings to be taken in full court, or at chambers, as it may find expedient.

The practice of directing references before a judge in chambers instead of to a master is now almost obsolete.

The plaintiff has, *prima facie*, a right to have the reference directed to the master resident in the county where the bill is filed, *Macara v. Gwynne*, 3 Grant 310.

2. The court may obtain the assistance of accountants, merchants, engineers, actuaries, or other scientific persons, in such way as it may think fit, the better to enable it to determine any matter in evidence in any cause or proceeding, and may act on the certificate of such persons, (*Imp. Act*, 15 & 16 V. c. 80, s. 42.)

As to the effect of the powers given by this section in extending the jurisdiction of Equity, see *McIntosh v. Great Western Railway Co.*, 3 Sm. & G. 146; *Mildmay v. Methuen*, 1 Drew. 216; 16 Jur. 965. As to the employment of accountants, *Re London, Birmingham & Bucks Rail. Co.*, 6 W. R. 141; and they need not always be employed in the presence of the parties, *Ibid*.

#### XXXIV. JUDGES' CHAMBERS—BUSINESS TO BE DESPATCHED THERE, AND MODE OF PROCEDURE.

1. In future one of the judges of the court will sit daily at chambers for the despatch of the following business, and of such other matters as the court from time to time shall think may be more conveniently disposed of in chambers than in full court, viz:—(1.) For the sale of the estates of infants, under statute 12 Victoria, chapter 72. (2.) As to the guardianship, maintenance, and advancement of infants. (3.) For the administration of estates under Order XV. (4.) For time to answer or demur. (5.) For leave to amend bills. (6.) For changing the venue. (7.) To postpone the examination of witnesses, or to allow the production of further evidence. (8.) For the production of documents. (9.) Relating to the conduct of suits or matters. (10.) As to matters connected with the management of property.

Whatever applications can under these orders be made in chambers, must be so made, *Moffatt v. Ruddle*, 4 Grant 44.

The court refused to hear otherwise than in chambers, a motion to extend the time for payment of mortgage money, *Anon.* 4 Grant 61.

A commission *de lunatico inquirendo* will be granted in chambers, *Re*



*Stuart*, 4 Grant 44; and so may a writ of *habeas corpus*, *Re Paton*, 4 Grant 147.

For the mode of proceeding under 12 Vic. c., 72, see *Ord.* 87.

The provisions of the statute 22 Vic. c., 93; (Con. Stat. U. C. c. 74.) have not the effect of excluding the jurisdiction of the Court of Chancery, in respect to the appointment of guardians to infants, *Re Stanard*, Cham. R. 15.

The jurisdiction, where proceedings originate at chambers, extends only to simple cases, *Pump v. Greenhill*, 20 Beav. 512.

On the death of a receiver, an application for another may be made in chambers, *Grote v. Bing*, 9 Hare, App. 50; and the appointment of a receiver in the first instance, if by consent, may be made in chambers, *Blackborough v. Ravenhill*, 16 Jur. 1085.

Order for payment into court of purchase money may be made in chambers, *Davenport v. Davenport*, 22 L. J. Chan. 11; and so should motions to open biddings.

2. A judge sitting at chambers may exercise the same power and jurisdiction, in respect of the business brought before him, as is exercised by the court; all orders made by a judge at chambers are to have the force and effect of orders of the court; and all or any of the powers, authorities, and jurisdictions, given to the master of the court by any act or acts now in force, or by any general order or orders of the court may be exercised by the judge sitting at chambers.

Orders made in chambers must be entered as well as those made in full court.

3. The court may adjourn for consideration in chambers any matter which, in the opinion of the court may be disposed of more conveniently in chambers; and any judge sitting in chambers may direct any matter to be heard in open court which he may think ought to be so heard; and such matter is to be adjourned at the request of either party, subject to such order as to costs or otherwise as the court may think it right to impose.

Matters adjourned from chambers under this section, and applications in the nature of re-hearings to discharge or vary orders made in chambers, are to be heard in full court on the last Wednesday of every month, except during re-hearing terms, *Ord.* 87, s. 2.

See O. 14.  
20 Dec. 1865

4. The course of proceeding in chambers is ordinarily to be the same as the course of proceeding in court upon motion. When an application is made to a judge at chambers, where, according to the present practice, a motion would have been made to the court, notice of the application (where the proceeding is not *ex parte*) is to be served on the opposite party, in the same manner as notice of the motion would have been. In other cases, an appointment is to be obtained from the presiding judge, which may be in a form similar to the form set forth in schedule M. hereunder written, with such variations as the circumstances of the case may require.

No state of facts, charges, or discharges, are to be brought in. But, when directed, copies, abstracts, or extracts of or from accounts, deeds, or other documents, are to be supplied for the use of the judge. But no copies of deeds, or documents, are to be made, where the originals can be brought in, without special direction.

For the form of appointment see appendix of forms.

The latter part of this section is extended to the masters' office, *Ord. 42, s. 5.*

5. When it appears to the judge, upon the hearing of any matter, that, by reason of absence, or for any other sufficient cause, the service of notice of the application or of the appointment, cannot be made, or ought to be dispensed with, the judge, if he think fit, may wholly dispense with such service, or may, in his discretion, order any substituted service, or notice, by advertisement, or otherwise, in lieu of such service. (*Eng. Con. Ord. 35, r. 18.*)

6. When, in the prosecution of any proceeding under a decree, it appears to the judge at chambers that some persons, not already parties, ought to be made parties, and ought to attend, or be enabled to attend the proceedings before him, he may direct an office copy of the decree to be served upon such parties, and upon due

service thereof such persons are to be treated and named as parties to the suit, and shall be bound by the decree in the same manner as if they had been originally made parties to the suit. Every office copy of a decree directed to be served under this section is to be endorsed with a notice to the effect set forth in schedule N. to these orders, with such variations as circumstances may require.

The form of endorsement will be found in the appendix of forms. / 28

7. Any party served with an office copy of a decree under the preceding section may apply to the court, at any time within fourteen days from the date of such service, to discharge the order, or to add to or vary the decree.

#### XXXV.—TAKING ACCOUNTS.

1. Where an account is taken at chambers the presiding judge may give such special direction, if any, as he may think fit, with respect to the mode in which the account is to be taken or vouched; and, in cases where he shall think fit so to do, he may direct that in taking the account the books of account in which the accounts required to be taken have been kept, or any of them, shall be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objections thereto as they may be advised.

This section applies only where the vouchers have been lost and the accounts cannot be taken in the ordinary way; such directions will not be given merely to save expense, nor when ordinary evidence can be had, *Lodge v. Pritchard*, 3 DeG. M. & G. 908.

Accounts taken in a suit in Jamaica ordered to be *prima facie* evidence, *Sleight v. Lawson*, 3 K. & J. 292.

2. An accounting party is to bring in his account in the form of debtor and creditor, and verify the same by affidavit, unless the judge shall otherwise direct. The items on each side of the account are to be numbered.

consecutively, and the account is to be referred to by the affidavit as an exhibit, and not to be annexed thereto, and is to be left at judge's chambers. (*Eng. Con. Ord.* 35, r. 33.)

As to the practice in Judges' chambers in England with regard to requiring verified copies of accounts, see *Cannan v. Evans*, 10 Hare, App. 9.

3. Any party seeking to charge any accounting party beyond what he has by his account admitted to have received, is to give notice thereof to the accounting party, stating, as far as he is able, the amount sought to be charged, and the particulars thereof, in a short and succinct mannner. (*Eng. Con. Ord.* 35, r. 34.)

#### XXXVI.—SALES.

1. Sales under the decree or order of this court are to be conducted in the following manner: No copy of the decree, or order, or any part thereof, is to be brought into the judge's chambers or master's office, but the original decree or order is to be used, unless the judge or master requires such copy.

Notwithstanding this order, it is the invariable custom to carry in and file with the master, a copy of the order directing the sale, in the same manner as on an ordinary reference.

2. An appointment or warrant is to be obtained from the judge or master, and served upon all necessary parties.

As to masters' warrants, the mode of underwriting, and service thereof, see *Ord.* 42, s. 3.

3. At the time appointed thereby, the party having the conduct of the sale is to bring into the judge's chambers or master's office a draft advertisement, but no particulars or conditions of sale, or any draft or copy thereof.

Usually the plaintiff has the conduct of the sale, *Dale v. Hamilton*, 10 Hare, App. 7; though the court may give it to another, in a proper case, as where plaintiff had liberty to bid, *Dixon v. Pyner*, 14 Jur. 218; see *Knott v. Cottee*, 27 Beav. 33.

When a sale is asked by a defendant in a foreclosure suit, the court may

require the party asking it to conduct the sale at his own expense, *Ord. 75*; but see *Taylor v. Walker*, 8 Grant 506.

4. Such draft advertisement is to contain the following particulars, viz: 1st. The style of cause. 2nd. That the sale is in pursuance of the order or decree of this court. 3rd. The time and place of sale. 4th. A short and true description of the property to be sold. 5th. The manner in which the property is to be sold, whether in one lot or several, and if in several in how many, and what lots. 6th. What proportion of the purchase money is to be paid down by way of deposit, and at what time or times, and whether with or without interest the residue of such purchase money is to be paid. 7th. Any particular or particulars in which the proposed conditions of sale differ from the standing conditions.

5. At the time named in such appointment or warrant, the judge or master is, in the presence of all parties served, or of such of them as attend to settle such advertisement, to fix the time and place of sale; to name an auctioneer, where one is to be employed; and to make every other necessary arrangement preparatory to the sale, so that nothing may remain to be done but to insert the advertisement; and all the before-mentioned matters must be done at one meeting, namely, upon the return of the appointment or warrant, where it is practicable, and no adjournment of such meeting is to take place, and no new meeting is to be appointed for the aforesaid purposes, unless it be unavoidable.

6. The advertisement is to be inserted by the party conducting the sale, at such times and in such manner as the judge or master has appointed at the meeting before mentioned.

7. The judge or master may fix an upset price or reserved bidding, where it is thought expedient, without further order; but this must be done at the meeting before mentioned, and it must be notified in the conditions.

of sale ; the master or his clerk is to conduct the sale where no auctioneer is employed ; the deposit is to be paid to the vendor, if present, or if not, to his solicitor, at the time of sale, and is to be forthwith paid by him into court : biddings need not be in writing, and all parties, except the one having the conduct of the sale, may bid thereat, provided it be notified in the conditions of the sale ; a written agreement is to be signed by the purchaser at the time of sale ; after the sale is concluded, the auctioneer, where one is employed, is to make the usual affidavit according to the present practice, and where no auctioneer is employed, the master or his clerk is to certify to the court to the same effect, but the master is to make no report, allowing the purchaser in any case.

In order to fix an upset price or reserved bidding, evidence must be laid before the master as to the value of the estate. From this information the master prepares a certificate whereby he directs that the sum of £—— shall be the reserved bidding for the property, at the sale. This certificate is then put in a sealed envelope and addressed to the auctioneer.

For the form of an auctioneer's affidavit see appendix of forms.

10. Such sale must be objected to by motion to the court to set aside the same, and notice of such motion must be served upon the purchaser and the other parties to the cause.

If an application be made to open the biddings, it should be made before the master's report on the sale is confirmed.

Where there are several lots and different purchasers, a separate notice of motion to open biddings must be given as to each lot, *Smith's Chan. Pr.* 1006. Where one purchaser buys several lots, there need be only one notice of motion, *Price v. Price*, 1 S. & S. 386 ; see also *Watts v. Martin*, 4 Bro. C. C., 113 ; *Warde v. Cooke*, 9 Sim. 87.

Mere advance of price, if the report on the sale be not confirmed, is sufficient to open the biddings, 2 *Daniel's Chan. Pr.* 938 ; *Preston v. Barker*, 16 Ves. 140. The advance required used to be ten per cent, but that rule is not adhered to now, *White v. Wilson*, 14 Ves. 151 ; biddings opened on advance of five per cent, *Brooks v. Snaith*, 3 V. & B. 144 ; on an advance of £80 on £430, *Bourn v. Bourn*, 13 Sim. 189 ; on an advance of £80 on to £775, *Connell v. Hardie*, 8 Y. & C. Ex. 677.

In opening biddings the court always looks substantially to that which

is for the benefit of the parties to the cause, and to the circumstances of the particular case before it, *Power v. Power*, 3 Ir. Eq. R. 511.

After the report on sale is confirmed, increase of price alone, however large is not sufficient to induce the court to open the biddings, although it is a strong auxiliary argument when there are other grounds, 2 *Daniel's Ch. Pr.* 941: as to opening biddings after report, see *Sir Thomas Jones' Settled Estates*, 1 Giff. 284.

Any person may apply to open the biddings, *Hooper v. Goodwin*, Coo 95; *Chapman v. Fowler*, 3 Hare 577; but the opinion of the court appears to have fluctuated upon the question, whether the court will entertain an application to open biddings on behalf of a party who was present at the sale, 2 *Daniel's Chan. Pr.* 938.

The person opening the biddings applies to do so, at his own expense, paying in his deposit, paying the costs of the purchaser and interest on such part of the purchase money as shall be found to have lain dead, *Banks v. Banks*, 16 Beav. 380; 2 *Daniel's Ch. Pr.* 942.

Where the biddings are opened and a resale takes place, the person at whose instance they were opened will, if he is outbid at the resale, be discharged, and will receive back his deposit; *Williams v. Attenborough*, T. & R. 77; but he is not entitled to an allowance for his costs, as they are in the nature of a premium paid by him for the opportunity of bidding, *Rigby v. McNamara*, 6 Ves. 466; *Earl Maclesfield v. Blake*, 8 Ves. 214; *Trefus' v. Clinton*, 1 V. & B. 361.

But where the biddings are opened for the benefit of the family, costs may be allowed, *Owen v. Foulks*, 9 Ves. 248; *West v. Vincent*, 12 Ves. 6; *Chapman v. Fowler*, 3 Hare 577; *Filder v. Bellingham*, 1 Coll. 520; *Gravenor v. Miles*, 9 Jur. 938.

11. At any time after the confirmation of the sale the purchaser may pay his purchase money and interest, or the balance thereof, into court without further order, but with the privity of the registrar and upon notice to the party having the conduct of the sale; and shall thereupon be entitled to be let into possession of the estate, and may either proceed, according to the present practice, to obtain possession thereof, or, if such possession be wrongfully withheld from him, may at his own expense obtain an order against the party in possession for the delivery thereof to him.

If the purchaser neglect to pay in his purchase money, and no objection is made to the title, the court will order him within a limited time to pay in the amount with interest, and in default direct a resale of the property, and that the purchaser pay costs of the motion and deficiency, if any, on



resale, *Crooks v. Crooks*, 4 Grant 376; but if the purchaser become insolvent, and unable to complete the contract he will be discharged from it, *Re Heely*, Cham. R. 54; and see *Re Yaggie*, *Ibid.* 52. A purchaser of real estate, at a sale under the decree of the court, will not be ordered to pay the amount of his purchase money into court until his title has been accepted or approved of, *Crooks v. Street*, Cham. R. 95; but see, 2 *Daniel's Chan. Pr.* 936.

12. When an enquiry into title has been directed by the court, the vendor is to deliver an abstract of the title to the purchaser, and if the purchaser does not object to the title and obtain and serve an appointment or warrant from the judge or master, to consider the same, within fourteen days after the delivery of such abstract, he is to be deemed to have accepted such title; at the time of serving the appointment or warrant the purchaser must deliver to the vendor a written notice of the objections to the title; at the time appointed a duplicate of such notice is to be brought into the judge's chambers or master's office by the objecting party, and such objections are to be argued before the judge or master, who is to allow or disallow such objections; and such allowance or disallowance is to be subject to appeal by way of motion to the court; the judge or master is to make no report upon the title; but the judge or master is merely to mark the objections allowed or disallowed, as the case may be; such objections so marked are to be filed, and such allowance or disallowance is to stand absolutely confirmed, unless appealed from within fourteen days after such filing.

When the party served with the abstract considers it an insufficient one, he cannot, by returning the abstract and calling for a further one, prevent the fourteen days from running. The proper course for him to pursue is, either to serve a notice of objection to the abstract and take out a warrant to consider these objections before the master, or to take out a warrant for the vendor to shew cause why he should not serve a further and better abstract, and that fourteen days from the delivery of such further abstract may be allowed for delivering objections to the title.

On moving to make an order *nisi* for not delivering an abstract of title absolute, it is necessary to shew that it has not been delivered to either, party named in the order, *Dick v. McNab*, Cham. R. 31.

13. The standing conditions of sale are to be those set forth in schedule O, attached to these orders.

These conditions of sale will be found in the appendix of forms. If the conditions of sale in any particular case differ from these standing conditions, the particulars in which they differ must be stated in the advertisement, see s. 4.

**XXXVII.—APPLICATION FOR THE SALE OF INFANTS'  
ESTATE UNDER 12 VICTORIA, CH. 72.**

1. A petition for the sale or other disposition of the real estate of an infant, is to be intituled both in the matter of the infant and in the matter of the 12 Victoria, chapter 72.

The court may order the sale, letting for a term of years, or other disposition of an infant's real estate, where it is of opinion that such a proceeding is necessary or proper for the maintenance or education of the infant, or that, by reason of any part of the property being exposed to waste and dilapidation, or to depreciation from any other cause, his interest requires or will be substantially promoted by such disposition, *Con. Stat. U. C.* c. 12, s. 50; but no sale, lease, or other disposition shall be made against the provisions of any will or conveyance, by which the estate has been devised or granted to the infant or for his use, *Ibid.* s. 51.

2. The petition is to be presented by the guardian of the infant, or by a person applying by the same petition to be appointed guardian, as hereinafter provided.

Petitions under this order are presented in chambers, *Ord.* 84, s. 1; in the name of the infant by his next friend or guardian, *Con. Stat. U. C.* c. 12, s. 52. The provisions of the recent act 22 Vic. c. 93, have not the effect of excluding the jurisdiction of this Court, in respect to the appointment of guardians to infants, *Re Stannard*, *Oham. R.* 15

3. The petition is to state the nature and amount of the personal property to which the infant is entitled—the necessity of resorting to the real estate—its nature, value, and the annual profits thereof. It must also state circumstances sufficient to justify the sale and disposition of the estate, and the application of the proceeds in the manner proposed. The prayer must state specifically the relief that is desired; it must designate the lands to be disposed of, and must propose a scheme for that pur-

pose, and for the appropriation of the proceeds. If an allowance for the maintenance is desired, it must be so prayed, and a case must be stated to justify such an order, and to regulate the amount.

As to the petition and procedure thereon, see *Re McDonald*, 1 Grant 90.

The court will not direct a sale of the real estate of an infant, merely because the ancestor was indebted; it must be shewn that the estate will sustain loss, or that the creditors are about to enforce payment of their demands by suit, *Re Boddy*, 4 Grant 144.

In directing the sale of infants' real estate the court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit; and will order a sale of a portion of an infant's estate to save the rest where it is made to appear to be for the benefit of the infant, *Re McDonald*, Cham. R. 97.

Where the application appeared to be more for the benefit of the father than of the infant, the court refused to make any order, *Re Taylor*, 1 Grant 91.

Where a mortgagee dies intestate, leaving an infant heir, after a decree for foreclosure, but before the final order, and his administrator revives the suit and obtains such order, and the mortgage debt equals or exceeds the value of the mortgaged premises, the infant heir is a person seised upon trust, within the meaning of the English statute, 11 Geo. 4 & 1 Wm. 4, c. 10, s. 6, and may be ordered on petition, without suit, to convey the estate to the administrator, or to a purchaser from him. The court will not, however, make the order, unless it appears that the application of the estate in question is necessary for the satisfaction of the debts of the intestate, and a reference as to this will be directed, *Re Hodges*, 1 Grant 285.

Where it is necessary for the purpose of a suit to obtain an order, for the execution of a conveyance by infant representatives of a mortgagee not parties to the cause, the proper mode of applying is by petition, *Owen v. Campbell*, *Re Mills*, 4 Grant 630.

In applying for the sale of real estate settled upon infants, the mother, by whom the application was made, was required to join in the conveyance for the purpose of surrendering the life-interest vested in her under the settlement, *Re Kennedy*, Cham. R. 97.

4. The petition may pray for the appointment of a guardian, as well as for the disposal of the infant's estate. In that case a proper case must be made by the petition, and established by the evidence, for the appointment of the person proposed.

5. Upon all petitions for the sale of an infant's estate, the infant is to be produced before one of the judges at chambers, or before a master.

6. When the infant is above the age of seven years he is to be examined, apart, upon the matter of the petition, and his consent thereto, by the judge or master, as the case may be ; and his examination is to be stated to have been taken under these orders, and is to be annexed to, and filed with the petition. Where the infant is under the age of seven years, the fact is to be certified by the judge or master before whom he has been produced.

The statute expressly directs that the application shall not be made without the consent of the infant, if he is of the age of seven years or upwards, *Con. Stat. U. C. c. 12, s. 52.*

7. The witnesses to verify the petition are to be produced before the judge, or master, as the case may be ; and are to be examined *viva voce* to the matter of the petition, and the depositions so taken are to be stated to have been taken under this order.

8. The masters of the court are authorised to examine infants and witnesses under this order, without special order or reference.

9. Upon a petition so verified, the court may either grant the relief prayed at once, or make such order as to further evidence, or otherwise, as the circumstances of the case may require.

#### XXXVIII.—RECEIVERS.

1. Receivers are to be appointed in the following manner : the party prosecuting the order for a receiver is to obtain an appointment or a warrant from the judge or master, and to serve the same on all the necessary parties, naming in the copy thereof served, the proposed receiver and his sureties ; at the time appointed the party prosecuting the order is to bring into the judge's chambers, or the master's office, the recognizance or bond pro-

posed as security; the bond or recognizance is to be to the master; any other party desirous of proposing another person as receiver, is to serve notice of his intention so to do upon the other parties, naming in such notice the person proposed by him as receiver, and his sureties, and is then in like manner to bring into the judge's chambers or master's office the recognizance or bond proposed by him as security: at the time named in the appointment or warrant the judge or master is, in the presence of the parties, or those who attend, to consider of the appointment of the receiver, and to determine respecting the same; and to settle and approve the proposed security; the master is to make no report approving of or appointing the receiver; but the judge or master is to appoint such receiver by signing a written appointment to the following effect, viz., "IN CHANCERY, [*style of cause*]"—I hereby appoint [*receiver's name*] receiver in this cause, [*signature of judge or master*];" which appointment is to be signed without any warrant or attendance for that purpose: when signed it is to be filed by the party who has procured the person named by him as receiver to be appointed, and is then to have the same effect as the filing of the master's report appointing the receiver now has; but the same is not to be filed until after the execution and filing of the securities settled and approved by judge or master.

A receiver is an indifferent person between the parties, appointed by the court to receive the rents, issues and profits of lands, or any other thing in question pending the suit, where it does not appear reasonable to the court that either party should do it; or where a party is incompetent to do so, as in the case of an infant. The appointment of a receiver rests in the discretion of the court, *Skip v. Harwood*, 3 Atk. 564; *Owen v. Homan*, 3 Mac. & Gor. 378; and when appointed he is treated as the officer and representative of the court, and is subject to its orders.

For cases in which a receiver will be appointed see *Berney v. Sewell*, 1 J. & W. 648; *Owen v. Homan*, 3 Mac. & Gor. 378; *Silver v. Bishop of Norwich*, 3 Swanst. 112; *Smith v. Smith*, 10 Hare, App. 71; in suits against executors and trustees, *Richards v. Perkins*, 3 Y. & O. Ex. 299; *Brodie v. Barry*, 3 Mer. 695; *Wilson v. Wilson*, 2 Keen 249; *Prichard v. Fleet*

*wood*, 1 Mer. 54; *Middleton v. Dodswell*, 18 Ves. 266; but see *Lord v. Purchase*, 17 Beav. 171; in cases of partnership, *Const v. Harris*, T. & R. 496, 517; *Goodman v. Whitcomb*, 1 J. & W. 589; *Fairburn v. Pearson*, 2 Mac. & Gor. 144; *Baxter v. West*, 28 L. J. Chan. 169; *Clegg v. Fishwick*, 1 Mac. & Gor. 294.

A receiver may be appointed of the rents and profits of lands, houses, &c., and of all personal estate which is capable of being reduced into possession, *Watkins v. Brent*, 1 M. & C. 97; *Richards v. Perkins*, 3 Y. & C. Ex. 299; *Rendall v. Rendall*, 1 Hare 152; and in favour of an equitable creditor, of all property against which a legal creditor can obtain execution, *Davis v. Duke of Marlborough*, 2 Swanst. 132; and of whatever property is considered in equity as assets, *Blanchard v. Cawthorne*, 4 Sim. 566.

A trustee may in some cases be receiver, if he will act without emolument, *Sykes v. Hastings*, 11 Ves. 363; but no one who is a party to the suit, or solicitor can be receiver with emolument, unless no one else can be got to act, *Garland v. Garland*, 2 Ves. 137; ——— *v. Jolland*, 8 Ves. 72; the next friend of an infant cannot be receiver, *Stone v. Wishart*, 2 Madd. 64.

A receiver is usually prayed for by the bill, but this is not absolutely necessary, *Hart v. Tulk*, 6 Hare 611; *Ramsbottom v. Freeman*, 4 Beav. 145; *Dowling v. Hudson*, 14 Beav. 423.

The application for a receiver is made to the court upon motion, notice of which must be served, and it is not necessary to wait until the defendant's answer is filed, *Aberdeen v. Ohitty*, 3 Y. & C. Ex. 379; *Meaden v. Sealey*, 6 Hare 620; but the court will not before answer, appoint a receiver, unless a strong case is made for it, *Woodyatt v. Gresley*, 8 Sim. 180; objections to the bill on the grounds of misjoinder, multifariousness and want of parties have been held no answer to a motion for a receiver, *Evans v. Coventry*, 5 DeG. M. & G. 911.

A receiver may be appointed after an interlocutory decree, *Hiles v. Moore*, 15 Beav. 175; and even where the decree is not interlocutory, *Bowman v. Bell*, 14 Sim. 392; *Re Bywater*, 1 Jur. N. S. 227.

Though the application for a receiver must in the first instance be made to the court, yet if an order appointing one has been made, vacancies in the office may be filled up in chambers, *Grote v. Biny*, 9 Hare, App. 50.

Evidence must be produced before the master as to the nature and value of the property over which the receiver is to be appointed, in order that the master may fix the amount for which security is to be given.

A receiver having been appointed, it is the duty of any party to the record in possession of the property to deliver up possession to him, and if he refuses to do so, an order may be obtained upon motion that he do by a given day deliver up possession to the receiver, *Griffith v. Griffith*, 2 Ves. Sen. 401. Where the property is in the possession of tenants the order usually directs them to attorn and pay their rents in arrear as well as the growing rents to the receiver, *Simmons v. Ld Kinnaird*, 4 Ves. 747. The receiver should apply to the tenants to attorn, and if any of them refuse, the party obtaining the appointment of the receiver should serve them with

a copy of the order granting the receiver and of the certificate of his appointment, and with a notice of motion for an order that they do attend within four days after service of the order, or stand committed, *Reid v. Middleton*, T. & R. 455; and the court will order the tenants to pay the costs of this motion, *Hobson v. Sherwood*, 19 Beav. 575; but see, *Hobhouse v. Holcombe*, 2 DeG. & Sm. 208.

Any attempt to disturb the possession of the receiver, without the leave of the court being first obtained, is a contempt on the part of the person making it, *Angel v. Smith*, 9 Ves. 335; *Russell v. East Anglian Rail. Co.*, 3 Mac. & Gor. 104; and this rule extends to cases in which the receiver is appointed without prejudice to the right of persons having prior estates. If such persons wish to avail themselves of their right, they must apply to the court either for liberty to bring ejectment, or in the mode now substituted [Ord. 41] for the old examination *pro interesse suo*, *Bryan v. Cornick*, 1 Cox 422; even though their right to possession is clear, *Anon.*, 6 Ves. 287; and even although the order appointing the receiver is erroneous, *Ames v. Birkenhead Dock Trustees*, 20 Beav. 332.

The receivers salary is generally fixed upon the passing of his first account, when he is allowed in his discharge, a percentage upon his receipts by way of salary for his care and trouble. The usual percentage upon rents and profits of real estate is five per cent on the gross rental, but this the *maximum*. He may be entitled to allowances beyond his salary for any extraordinary trouble or expense he has been put to in the performance of his duties, *Potts v. Leighton*, 15 Ves. 276; but the court will not sanction such allowances, if objected to, unless he has had the previous approbation of the court for what he has done, *Re Ormsby*, 1 B. & B. 189; *Malcolm v. O'Callaghan*, 3 M. & C. 52; *Bristowe v. Needham*, 2 Phill. 190.

After tenants have attorned or paid rents to the receiver he may distrain for rent in arrear; and he may in the case of a tenant from year to year who has attorned, give notice to determine the tenancy, *Doe v. Read*, 12 East 59; but he cannot bring ejectment without the sanction of the court, *Wynne v. Ld. Newburgh*, 1 Ves. 164.

It is the duty of a receiver to pass his accounts regularly in the manner prescribed by the order under which he is appointed, and if he does not, he may be deprived of his salary, and charged with interest on the balance in his hands, *Ward v. Swift*, 8 Hare 139.

If a receiver does not bring in his accounts at the proper time, the party desiring them to be brought in may obtain a warrant for that purpose, and upon default he may have an attachment against the receiver. When the receiver brings in his account, but does not proceed upon them, the party prosecuting the decree takes out a warrant to proceed upon the accounts and serves all necessary parties; if the receiver does not attend on the return of the warrant to support his accounts, the master allows all the sums with which he has charged himself, and disallows his payments for want of being vouched, *Bertie v. Ld. Abingdon*, 8 Beav. 53.

To enforce payment of the balance reported due, an order should be



obtained upon notice, for him to pay the amount within a given time, *Davies v. Calcraft*, 14 Ves. 143; and if the order be not complied with, a writ of *fi. fa.* may be issued, and the recognizance or bond put in suit. An order must be obtained for leave to sue upon the bond, and if the sureties are to be proceeded against, notice of motion must be served upon them, *Ludgater v. Channell*, 15 Sim. 479.

The sureties for a receiver cannot be discharged at their own request, *Griffith v. Griffith*, 2 Ves. Sen. 400; *Gordon v. Calvert*, 2 Sim. 253; but this rule will yield to circumstances, as where underhand practice is proved, and the person secured is shown to be connected with it, *Hamilton v. Brewster*, 2 Moll. 407. With respect to the sureties liability, it extends to all the receiver would be liable to pay, *Dawson v. Raynes*, 2 Russ. 466.

Unless a receiver is expressly continued by the decree, an appointment previously made will be superseded by the decree, *Gibson v. Ld. Montfort*, 1 Ves. Sen. 485.

2. Committees of the persons and estates of lunatics, idiots and persons of unsound mind, and guardians, excepting guardians *ad litem*, are to be appointed in the same manner as nearly as circumstances will permit.

### XXXIX.—NOTICE OF MOTION

1.—A notice of motion by any party in the suit may be served at any time after bill is filed, without the leave of the court, except when the contrary has been expressly provided.

A notice of motion given for a day which is not a regular court day unless the leave of the court has been obtained, is a void proceeding and the party served need not appear thereon, *Stevenson v. Huffman*, 4 Grant 318; *Steedman v. Poole*, 11 Jur. 555; and if leave is given to serve notice for such a day, or to give less than two clear days notice, it must be so stated in the notice of motion, *Hill v. Rimell*, 8 Sim. 632; *Harris v. Lewis*, 8 Jur. 1063. The notice should set out the style of the cause correctly *Rowlatt v. Cattel*, 2 Hare, 186; *Pollard v. Doyle*, 2 W. R. 509; and should express shortly the object of the application, the person on whose behalf it is made, and the day on which it is returnable. If it be intended to ask for the costs of the application the notice should so express it, otherwise if the respondent does not appear the costs of the motion cannot be given, *Pratt v. Walker*, 19 Beav. 261; but if he do appear costs may be given though not asked by the notice, *Clark v. Jaques*, 11 Beav. 623; *Butler v. Gardener*, 12 Beav. 525; *Dawson v. Jay*, 2 W. R. 598.

Where a notice of motion was directed to the solicitor of the opposite party by a wrong name, an order obtained upon an affidavit of service thereof was set aside as irregular, *Moody v. Hebbard*, 11 Jur. 941.

Affidavits upon which any notice of motion is founded must be filed at the time of the service of such notice of motion, *Ord.* 40, s. 2; and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion, *Ord.* 77, s. 2.

Affidavits cannot be used on a motion, where no intention to read affidavits thereon is mentioned in the notice of motion, *Farish v. Martyn*, 1 Grant 300.

If a plaintiff gives notice of his intention to read an affidavit on the hearing of a motion, but declines to do so, the defendant is nevertheless entitled to read it, *Cauty v. Houlditch*, 1 Sim. 75; *Clarke v. Law*, 2 K. & J. 28.

A party is not bound to search for affidavits further back than the date of the notice of motion; and if it be intended upon making the motion to read any affidavits which have been previously filed in the cause, notice of such intention should be given to the opposite party, *Clement v. Griffiths*, Coop. 470.

The court will at any time previous to the hearing postpone a motion, in order to give time for filing affidavits in reply, *Electric Telegraph Co. v. Nott*, 11 Jur. 273.

Oral evidence may also be used upon any motion; for the mode of procuring the attendance of witnesses and of cross-examining parties who have made affidavits, see *Ord.* 40, ss. 7, 8 & 9.

When a notice of motion embraces two objects and the principal one fails, the party moving must pay the costs, *Sturch v. Young*, 5 Beav. 557. The plaintiff having given notice of motion for an injunction it was ordered to stand over at the request of the defendant; before the motion was heard the defendant filed a demurrer, which was allowed together with the costs of the suit, *held* that the defendants were entitled to the costs occasioned by the motion, *Finden v. Stephens*, 12 Jur. 319.

A motion which has been opened cannot be afterwards treated by the party moving, as an abandoned motion, but the parties opposing are entitled to their costs as on a motion refused, *Dugdale v. Johnson*, 5 Hare 92.

2. There must be at least two clear days between the service of a notice of motion, and the day named in the notice for hearing the motion, unless the court give special leave to the contrary; and there must be two clear days between the service of the petition and the day appointed for hearing the same; and in the computation of such two clear days, Sundays, or days on which the offices are closed, are not to be reckoned.

This section does not apply to notice of motion for decree, which must be

served at least three weeks before the day fixed for the motion, *Ord.* 16; or to motions under *Ord.* 41.

A notice of motion given for a day which is not a regular court-day, unless by leave of the court, is a void proceeding, and the party served need not attend thereon, *Stevenson v. Huffman*, 4 Grant 318; *Steedman v. Poole*, 11 Jur. 555; and if leave be given to serve notice for such a day, or to give less than two clear days notice, it must be so stated in the notice of motion, *Hill v. Rimell*, 8 Sim. 682; *Harris v. Lewis*, 8 Jur. 1068.

When an application is of such a nature as to require a detailed statement of the facts and circumstances upon which it is founded, the proper course is to make it by petition.

And as a general rule where an application is made in a suit by any person not a party to the suit, it should be made by petition; but when the notice of motion shows the title of the applicant, and no long statement of facts is necessary for that purpose, a person not a party to the record may apply by motion, *Jones v. Roberts*, 12 Sim. 189; *Earl of Portarlington v. Damer*, 2 Phil. 264.

Where a decree reserved further directions and costs, but the further directions became unnecessary, the costs were disposed of upon petition, *Winthrop v. Winthrop*, Coop. 20. The petition is entitled in the cause or matter and is addressed to "the Honourable the Judges of the Court of Chancery."

If presented by a person not a party to the suit, his name, residence and description must be set forth, *Glazbrook v. Gillatt*, 9 Beav. 492.

A copy of the judges *fiat* must be endorsed upon the copy of the petition served, and the original *fiat* should be produced and shown at the time of service.

The notes under the preceding section as to evidence, examination, and cross-examination of witnesses upon motions, and as to costs apply equally to applications by petition.

A petition may be amended by consent, at the hearing, *Matson v. Swift*, 9 Jur. 521; or even after the order is drawn up, *Hislop v. Wykeham*, 3 W. R. 286; *Re Bunnett*, 1 Jur. N. S. 921; but where a petition was amended by stating facts which occurred after the leave to amend was given, it was dismissed with costs, *Doubtfire v. Elworthy*, 15 Sim. 77.

Before any order made on a petition can be passed, the original petition must be filed, and where the original was lost, the court allowed a copy to be filed in its stead, *Sanderson v. Walker*, 1 M. & C. 359; *Smith v. Harwood*, 1 Sm. & G. 137; and the same was allowed where the petitioner refused to deliver the petition to the respondents to be filed, *Andrews v. Walton*, 1 M. & C. 360; *Re Hobler*, 9 Jur. 419.

In general a party served with a petition will not be entitled to his costs, if he appears merely for the purpose of claiming them, *Barton v. Latour*, 18 Beav. 526; *Day v. Croft*, 19 Beav. 518.

**XL.—EVIDENCE UPON MOTIONS, PETITIONS, AND INTER-LOCUTORY PROCEEDINGS.**

1. Admissions of the service of a notice of motion or other paper, upon the opposite solicitor, need not be verified by affidavit.

2. All the affidavits upon which any notice of motion is founded must be filed at the time of the service of such notice of motion ; and the affidavits either in support of, or in opposition to, any special motion or petition, are to be filed, as heretofore, with the registrar.

This section applies to suits in which the bill is filed with a deputy registrar, as well as to those in which it is filed with the registrar.

Affidavits in answer must be filed not later than the day before that appointed for the motion upon which they are to be used, *Ord. 77, s. 2*. When on a motion, affidavits filed before the date of the notice, are to be used, notice thereof must be served upon the opposite party, *Clement v. Griffiths*, Coop. 470 ; but objection for want of notice is waived by filing an affidavit in reply, *Blackmore v. Glamorgan Canal Co.*, 5 Russ. 151.

Where notice of intention to read an affidavit has been given, it cannot be withdrawn ; the opposite party may read it, *Cauty v. Houlditch*, 14 Sim, 75 ; or cross-examine upon it, *Clarke v. Law*, 2 K. & J. 28.

3. Original affidavits may be used on the hearing of any matter, instead of office copies.

This section is now repealed, except as to affidavits on *ex parte* applications, *Ord. 77, s. 1*.

4. Any party who requires an office copy of an affidavit to be used upon any application is to demand the same from the solicitor of the party by whom such affidavit has been filed, or on whose behalf it is to be used, and such copy is to be ready for delivery within forty-eight hours from the time of such demand, or within such other time as the court may in any case direct.

Demanding an office copy of an affidavit is a waiver of any objection that it was not filed at the time the notice of motion was served.

Any further time than forty-eight hours which may elapse before the copy is delivered, is not to be computed against the party demanding it, *Ord. 43, s. 4*.

5. All affidavits are to be taken and expressed in the first person of the deponent, and his name at the commencement of the affidavit is to be written in full, and not designated by any initial letter merely. No costs are to be allowed in respect of any affidavit which has not been drawn in conformity with this section.

Every affidavit to be used in any cause or matter must be written in a plain and legible manner, and must be divided into paragraphs, and every paragraph must be numbered consecutively, and be confined as nearly as may be to a distinct portion of the subject, and if any affidavit violate the above directions, no costs are to be allowed for it, nor can it be used in support of, or in opposition to, any motion without the express permission of the court, *Ord. 64.*

Each statement in an affidavit, which is to be used as evidence at the hearing of a cause or matter, or on a motion for decree or other motion, or on any other proceeding before the court (or before the judge in chambers), shall shew the means of knowledge of the person making such statement, *Ord. 80.*

Every affidavit should be intituled in the cause or matter in which it is made, and contain the true place of residence, description, and addition of the deponent, and great care should be taken that the names of parties are accurately set forth, *Salomon v. Stalman*, 4 Beav. 248; *Hawes v. Bamford*, 9 Sim. 653; but this order does not apply to parties in the cause, who may describe themselves as the above mentioned plaintiff or defendant, without specifying any residence, addition, or other description, *Crockett v. Bishton*, 2 Madd. 446.

As a general rule an affidavit cannot be made in a suit until the bill is filed; but where it is necessary to have an affidavit annexed to a bill at the time of filing, it is no objection to the affidavit that it was sworn before the bill was filed, *Walker v. Fletcher*, 12 Sim. 420; and where in an injunction suit affidavits had been by mistake filed before the bill, they were allowed to be read in support of an interim injunction, *Fennall v. Brown*, 18 Jur. 1051.

6. Every affidavit is to be read over to the deponent by the master or examiner who is required to administer the oath; and the master or examiner is to inform such witness that he is liable to be cross-examined touching the matter of such affidavit; and when the witness desires to qualify or add to his deposition, the master or examiner is to vary the same accordingly; and the jurat is to be in the form and to the effect set forth in schedule P. to these orders.

*Rogers v. Crookshank*  
*Law Journal N. S.*  
*5. (Chancery 11 Dec. 9*  
*67). - also Dickenson*  
*c. Blake 7 April 1881.*

In affidavits of execution, justification by sureties, and of service, the short form of jurat is sufficient, *Re Aulsebrook*, 4 Grant 109.

For the form of the jurat, see appendix of forms.

An affidavit purporting to be sworn before a mayor of a city in England is inadmissible without proof of his signature and authority to administer oaths; but where the affidavit is sworn out of England, it is receivable as evidence in the courts of this country under the provisions of the imperial statute 14 & 15 Vic. c. 99, *Graham v. Macpherson*, Cham. R. 85; but this does not apply to affidavits of service of bills out of the jurisdiction, which are to be sworn before the persons mentioned in the order respecting service abroad, *Ord.* 101, s. 9.

7. Any person in any cause or matter depending may, by a writ of *subpœna ad testificandum*, or *duces tecum*, require the attendance of any witness before the court, or before a deputy master, or before an examiner specially appointed for the purpose, and examine such witness orally for the purpose of using his evidence upon any motion, petition, or other proceeding before the court, in like manner as he may now require such witness to attend and be examined with a view to the hearing of the cause; and any party having made an affidavit to be used, or which shall be used on any motion, petition, or other proceeding before the court, shall be bound to attend for the purpose of being cross-examined, on being served with such writ; but the court, nevertheless, in its discretion, may act on the evidence before it at the time, and may make such *interim* order, or otherwise, as may appear necessary to meet the justice of the case.

No evidence can now be taken under this section before the court, unless the court grant leave upon a special application supported by affidavits, *Ord.* 55.

An appointment for the examination of witnesses for the purpose of a motion to amend which plaintiff stated it was his intention to make, but no notice of which had been served, was discharged, on the ground that no examination of witnesses for the purpose of an interlocutory application could be had until notice of motion or petition had been served, *Barton v. Lewis*, V. C. Esten, 3rd Feby., 1863.

8. Any party in any cause or matter who requires the attendance of any witness, whether a party to the cause or matter, or not, for the purpose of his being examined

with a view to his evidence upon any motion, petition, or other proceeding before the court, *not being the hearing of a cause*, is to give to the opposite party or parties forty-eight hours' notice, at least, of his intention to examine such witness, and of the time and place of such examination, unless the court think fit in any case to dispense with such notice. The cross-examination, in such case, is to follow immediately upon the examination, and is not to be deferred to any future time.

9. Where it is desired to cross-examine any witness, whether a party to the cause or matter, or not, who has made an affidavit to be used, or which has been used upon any motion, petition, or other proceeding before the court, *not being the hearing of the cause*, the party who desires to cross-examine such witness is to give forty-eight hours' notice to the party on whose behalf such affidavit was filed, or to the party intending to use the same, of the time and place of such intended cross-examination, in order that such party, if he thinks fit, may be present at such intended cross-examination.

A defendant may cross-examine a co-defendant's witness, *Lord v. Colvin*, 8 Drew. 222; all the evidence is common to all parties, *Sturges v. Morse*, 26 Beav. 562.

Where defendant cross-examines plaintiff's witness it is convenient that other defendants in the same interest with plaintiff, should cross-examine him afterwards, and then the first defendant re-examine, *Harrison v. Mayor of Southampton*, 2 Jur. 435; where plaintiff and other defendants wish to cross-examine, it is convenient that plaintiff cross-examine first, *Lord v. Colvin* 8 Drew. 222.

A solicitor cannot be compelled to produce his client for examination, *Spicer v. Dawson*, 22 Beav. 282.

The witness to be examined or cross-examined is not bound to forty-eight hours notice of such examination, but to such notice whether more or less, as under the circumstances may be reasonable, *North Wheal Exmouth Mining Co.*, 8 Jur. N. S. 1168.

#### XLI. EXAMINATION PRO INTERESSE SUO ABOLISHED.

1. The practice of applying to the court for an order to be examined *pro interesse suo* is hereby abolished.

Under the former practice the proper course for any person who claimed



title to any property sequestered, was to apply to the court by motion or petition, to direct the plaintiff to exhibit interrogatories, in order that the party applying might be examined as to his title to the property; and this mode of proceeding was followed where the property was in the possession of a receiver, *Brooks v. Greathead*, 1 J. & W. 178; *Angel v. Smith*, 9 Ves. 338.

An order for the examination of a party *pro interesse suo* could not be granted until after the sequestrators had made a return, because, it could not till then appear to the court what had been sequestered, *Lord Pelham v. Duchess of Newcastle*, 8 Swanst. 290.

2. In lieu thereof, any party who might have moved to be examined *pro interesse suo* may apply to the court, upon motion, for such relief as he may think himself entitled to.

3. Motions under this order are to be governed by the practice prescribed by the sixteenth order, in relation to motions for a decree.

Three weeks' notice of motion must be given, and the applicant's affidavits must be filed before the notice of motion is served; the affidavits in answer should be filed within ten days after service of the notice of motion and within six days thereafter the applicant's affidavits in reply, *Ord. 16*.

4. On hearing the motion, the court, in its discretion, may either grant or refuse the motion, or it may give such directions for the examination of parties or witnesses—or for the making further enquiries,—or for the institution of any suit or action, as the circumstances of the case may require.

5. When it can be made to appear to the court that it would be conducive to the ends of justice to permit a notice to be served for some day earlier than that prescribed by the 16th order, leave may be obtained for that purpose, upon an *ex parte* application to a judge at chambers in the manner prescribed by the 17th order.

#### XLII.—THE MASTER'S OFFICE.

1. Every decree or order referring any matter to the master is to be brought into his office within fourteen days after the decree or order shall have been pronounced,

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by the party having the carriage of the same; otherwise any other party to the cause, or any party having an interest in the reference, may apply to the court as he shall be advised, that the prosecution of such decree or order may be committed to him, or otherwise, for the purpose of expediting the prosecution thereof.

This section is a copy of the 48th Order of April, 1828, in England, except that by that order the time within which a decree was to be brought into the master's office was two months instead of fourteen days as in this section. The section ought to read within fourteen days after the decree or order is *entered*, as some time frequently and of necessity elapses, before a decree, after it is *pronounced*, can be passed and entered.

This section applies only to delay in prosecuting a decree after it has been passed and entered; if the party having the conduct of the suit delays after judgment is pronounced, to procure the passing and entering of the decree, the registrar may draw it up at the instance of any other party, and deliver it to him, *Daniel's Ch. Pr.*, 780.

Where a decree has been carried into the master's office, section 10 of this order provides, that, if the party prosecuting the decree does not proceed with due diligence, the master may give the conduct of the reference to any other person interested.

2. Upon the bringing in of every decree or order, the solicitor bringing in the same is to take out a warrant (unless the master shall dispense therewith) appointing a time, which is to be settled by the master, for the purpose of taking into consideration the matters referred by such decree or order, and is to serve the same upon the parties, or their solicitors, unless the master shall dispense therewith; and upon the return of such warrant to consider, or upon the bringing in of the reference when no such warrant shall have been issued, the master is to proceed to regulate in all respects the manner of proceeding with such reference, and the manner in which each of the accounts and enquiries is to be prosecuted.

As to the evidence to be adduced in support thereof, and therein to give such special directions (if any) as he may think fit with respect to the mode in which any accounts referred to him are to be taken or vouched; and,

if he think fit so to do, to direct that in taking such accounts the books of account, in which the accounts required to be taken have been kept, or any of them, be taken as *prima facie* evidence of the truth of the matters therein contained, with liberty to the parties interested to take such objection thereto as they may be advised.

As to the parties who are to attend on the several accounts and enquiries.

As to the time at which, or within which, each proceeding is to be taken.

And he is to fix a time at which to proceed to the hearing and determining of such reference, appointing a day in the meantime, if he shall think fit, for the purpose of entering into the accounts and enquiries, with a view to ascertaining what is admitted and what is contested between the parties; and such directions may be afterwards varied or added to, as may be found necessary; and in giving such directions, and in regulating the manner of proceeding before him, the master is to devise and adopt the simplest, most speedy, and least expensive mode of prosecuting the reference, and every part thereof, and with that view to dispense with any proceedings ordinarily taken in the master's office, which he may conceive to be unnecessary; to shorten the periods for taking any proceedings, or to substitute a different course of proceeding for that ordinarily taken. Any party directed by the master to bring in any account, or to do any other act, is to be held bound to do the same in pursuance of the direction of the master in that behalf, without any warrant or written direction being served on him for that purpose.

The 50th and 51st of the English orders of April, 1828, are the foundation of this section.

A warrant to consider a decree, requires one clear day between the day of service and the return day, and Sunday is not counted; but in this country the practice is to require two clear day's service of all warrants.

A proceeding in the master's office may be supported by affidavits, or by oral evidence, but the master cannot receive affidavit evidence if objected

to, and it is advisable to have the mode in which the evidence is to be supplied, settled at the consideration of the decree, and if the parties then acquiesce in receiving affidavits, they are bound by such acquiescence, and cannot afterwards object.

Where the master did not at that time decide to admit affidavits, but afterwards admitted them, the admission of them having been expressly objected to by the opposite party, an exception to the report was allowed, *Gibbs v. Payne*, 4 Sim. 554.

It does not appear, however, that a positive assent to reading affidavits is required; the circumstance that a party has allowed affidavits to be used without objecting to them, will be sufficient to prevent his afterwards raising an objection to the master's report on the ground that the witnesses ought to have been examined, *Morgan v. Lewis*, 1 Newl. 533

3. When the master shall appoint a day, as provided for in section 2 of this order, for the purpose of entering into the accounts or enquiries referred to him, with a view of ascertaining what is admitted and what is contested between the parties; and when it becomes necessary to adduce evidence, or to incur expenses otherwise, in establishing or proving items of account or other matters which in the judgment of the master ought, under all the circumstances, to have been admitted by the party sought to be charged therewith, and which such party shall refuse to admit, the master, before making his report, is to proceed to tax such costs, occasioned by such refusal, as shall appear to him reasonable and just, and shall state in his report the amount of such costs and how the same were occasioned; and the party to whom such costs are to be paid is to be entitled, upon the master's report becoming absolute, to such process of the court to compel payment thereof as in other cases, provided always, that when the party entitled to receive the general costs of the cause is the party ordered to pay such costs, he is to be at liberty to deduct such costs from such general costs, provided such general costs, and such interlocutory costs, are between the same parties. When the master shall omit to appoint a day for the purpose aforesaid, it shall be competent to him to grant to any party bringing in accounts a warrant to proceed

on the same, for the purposes aforesaid ; such warrant to be underwritten, as follows, "On leaving the accounts of, &c. ; and take notice that you are required to admit the same, or such parts thereof as you can properly admit." And when the party so notified shall refuse to admit the same, the like consequences shall follow, under the like circumstances, as are hereinbefore provided for.

In underwriting masters' warrants, care should be taken that everything intended to be proceeded with on the separate appointments is fully and distinctly set out, and also that such underwriting corresponds exactly with the directions given by the master, and entered in his book. If this is not done, the opposite party may refuse to proceed with any matter before the master not expressed as intended to be taken up on that particular appointment. Also if any part of the underwriting necessitates the compliance by the opposite party with a directory order (such as to bring in books, &c.), and does not fully shew the manner and extent of the intended direction, the prosecuting party will be unable, if the direction is not complied with, to proceed to put the defaulting party in contempt ; but, at his own expense, will have to procure and serve a fresh appointment.

In order to put a party in contempt for default in obeying a master's warrant, it is unnecessary to have personal service of the order *nisi*; service on the solicitor will be sufficient.

For proceedings to contempt generally, and as to costs thereof, see *Ord. 46, s. 2.*

4. The master and each of the deputy-masters is to keep in his office a book, to be called the "master's book," in which, upon the bringing in of any decree or order of reference, is to be entered, the style of the cause, the name of the solicitor prosecuting the reference, the date of the decree or order being brought in, and an entry of the proceedings then taken ; and the master shall enter therein, from time to time, the proceedings taken before him, and the directions which he may give in relation to the prosecution of the reference, or otherwise.

5. No states of facts, charges, or discharges, are to be brought into the master's office. But, when directed,

copies, abstracts of, or extracts from accounts, deeds, or other documents and pedigrees, and concise statements, are to be supplied; and where so directed, copies are to be delivered as the master shall direct. No copies of deeds or documents are to be made where the originals can be brought in, without special direction.

This section is the same as the latter part of Ord. 34, s. 4.

6. Where any account is to be taken, the accounting party is, unless the master shall otherwise direct, to bring in the same in the form of debtor and creditor, verified by affidavit. The items on each side of the account are to be numbered consecutively, and the account is to be referred to by the affidavit as an exhibit, and not to be annexed thereto.

The above section is almost an exact copy of Ord. 34, s. 2.

7. Any party seeking to charge any accounting party beyond what he has in his account admitted to have received, is to give notice thereof to the accounting party, stating, so far as he is able, the amount so sought to be charged, and the particulars thereof in a short and succinct manner. (*Eng. Con. Ord. 35, r. 34.*)

8. Every reference appointed to be heard, as by section 2 of this order provided, is to be called on and proceeded with at the day and time so fixed, unless the master shall in his discretion think fit to postpone the same; and in granting any application to postpone the hearing of such reference, the master may make such order, as to the costs consequent upon such postponement, as he may think just. And as soon as the master shall have entered upon the hearing of such reference, he is to proceed therewith to the conclusion without interruption, when that is practicable; and when any reference cannot be concluded in a single day, the master is to proceed *de die in diem*, without any fresh warrant, unless he shall be of opinion that an adjournment other than *de die in diem* would be proper, and conducive to the ends of

justice; and when any such adjournment shall be ordered, the master is to note in his book the time and reason thereof; and in no case is any matter to be discontinued or adjourned for the mere purpose of proceeding with any other matter, (with the exception of the examination of witnesses during examination terms,) unless such course shall have become necessary.

9. Upon any application made by any person to the court, the master is, at the instance of the person making the application, to certify to the court, as shortly as he conveniently can, the several proceedings had in his office in the same cause or matter, and the dates thereof.

10. Where a party actually prosecuting a decree or order does not proceed before the master with due diligence, the master is at liberty, upon the application of any other party interested, either as a party to the suit, or as one who has come in and established his claim before the master under the decree or order to commit to him the prosecution of such decree or order, and from henceforth neither the party making default nor his solicitor is to be at liberty to attend the master as the prosecutor of such decree or order.

This section is a copy of English Order 56, of April, 1828.

Previous to that order, the practice of the court was, especially in creditors' suits, in case the party whose duty it was to prosecute a decree neglected his duty, to allow a party interested as a creditor to obtain an order to prosecute in his stead, *Creuze v. Hunter*, 2 Ves. 157; *Sims v. Ridge*, 3 Mer. 458; *Powell v. Walworth*, 2 Mad. 183; *Edmunds v. Ackland*, 5 Mad. 81; and the court may still exercise its authority by taking the prosecution of a decree from the plaintiff and entrusting it to another, and that even after the master has exercised his judgment upon it, and has refused the application, *Wyatt v. Sadler*, 5 Sim. 450.

11. Advertisements for creditors are to appoint a day and hour, and to name the place at which creditors are to come in and present and prove their claims before the master; for this purpose no state of facts shall be necessary, but the claims are to be duly verified by affidavit. At the time and place named in such advertisement, the



master is to proceed on the claims brought in before him without further notice, and may examine any parties as witnesses in relation thereto at such time, or thereafter, as he may see fit; and he is to allow or disallow, or adjourn the same, as to him may seem just. The costs of proving such claims are, in the discretion of the master, to be allowed to the creditors proving the same, and added to their debts respectively; or to be disallowed. And in case of their being allowed, they may be allowed in gross in place of taxed costs.

In a creditors' suit the plaintiff must prove his claim in the master's office, and each creditor may dispute the claims of the others, *Field v. Titmuss*, 1 Sim. N. S. 218; *Owens v. Dickenson*, Cr. & Ph. 48.

Although the time had elapsed, creditors were allowed to come in so long as the fund was in court, *Lashley v. Hogg*, 11 Ves. 602; after deficient assets apportioned among creditors, and transferred to the accountant-general for payment to them, another creditor allowed to come in on payment of consequent costs, *Angell v. Haddon*, 1 Madd. 529.

A creditor coming in after long delay every defence against his claim allowed as on a new bill, and undistributed part of the assets liable only proportionately, *Greig v. Somerville*, 1 R. & M., 338; creditor coming in after some legatees paid and fund carried to account of the rest, entitled to a proportional part only of the latter, *Gilespie v. Alexander*, 3 Russ. 180.

Claim disallowed by chief clerk in one suit, is not barred in another, *Tedd v. Beere*, 5 Jur. N. S. 381; 7 W. R. 394.

A claimant in an administration suit, may be cross-examined upon his affidavit in support of his claim, *Cast v. Poyser*, 3 Jur. N. S. 38; 26 L. J. Ch. 353.

A creditor is entitled to the costs of establishing his debt; and the court has jurisdiction to order payment of costs, by a creditor failing to prove his claim, *Hatch v. Searles*, 2 Sm. & G. 147; 2 W. R. 297; *Yeoman v. Haynes*, 24 Beav. 127; *Colyer v. Colyer*, 10 W. R. 748.

The power given to the master to allow a gross sum in lieu of taxed costs, does not affect the costs of the creditor who is plaintiff in the suit, *Flintoff v. Haynes*, 4 Hare 309.

Where the fund is insufficient, the costs are added to the debts and with them apportioned, *Morshead v. Reynolds*, 21 Beav. 688.

12. In master's reports no part of any account, charge, affidavit, deposition, examination or answer, brought in or used in the master's office, is to be stated or recited, but instead thereof the same may be referred to by date

or otherwise, so as to inform the court as to the paper or document so brought in or used.

13. In the taking of accounts in the master's office, it shall be within the cognizance of the master to take the same with rests or otherwise ; to take accounts of rents and profits received, or which, but for wilful neglect or default might have been received ; to set occupation rent ; to take into account necessary repairs, and lasting improvements, and costs and other expenses properly incurred otherwise or claimed to be so. And generally, in the taking of accounts, to enquire and adjudge as to all matters relating thereto, as fully as if the same had been specifically referred ; subject, nevertheless, to the revision of the court upon appeal from the master's report ; and it shall not be necessary to the taking of such accounts that any of the matters aforesaid should have been stated in the pleadings ; or that evidence thereof should have been given before the decree or order of reference ; or that such decree or order should contain any specific direction in respect thereof.

This section confers upon the master much larger powers, in many respects, than even a judge in chambers in England possesses. It has no English original, and is confined to the practice of our own court. Order 142 of April 1843 is the foundation upon which it rests, but altered by the removal of certain restrictions. That order provided that the accounts, to be taken by the master, should be taken according to the laws and practice of the Court of Chancery. This limitation in strictness of language was perhaps, unnecessary, as all accounts must have been, and must be taken in that manner, but it was not an unmeaning safeguard, and was a plain intimation to the master of his duty, and the mode of pursuing it. And there was a proviso that claims for improvements should not be entertained unless a case was made upon the pleadings for them.

An attentive consideration of the nature of the matters thus submitted to the jurisdiction of the master, and which will be found at some length below, and a careful observation of the practice relating thereto, has led to the conviction that it would be wiser and safer to require in all the cases contemplated by this section, that a case should be made upon the pleadings at least, if the order be not abrogated entirely, or limited merely to matters of course in the taking of accounts.

The questions involved in taking an account with rests, or charging with wilful default, or setting occupation rent, or taking account of improve-

ments, frequently require the investigation of the most delicate subjects upon which the jurisdiction of the court can be exercised, and the mode of procedure in the master's office, renders it almost impossible for the due consideration of them. True there is an appeal,—but an appeal is not a satisfactory mode of bringing matters of this description before the court,—every presumption is naturally made in support of the report, and a suitor comes at every disadvantage to ask a decision upon his rights, who comes by appeal from a decision of an officer of the court,—and this too, upon matters, which by every other system of equity, he is entitled to have submitted to the consideration and determination of the court in the first instance, without having to overcome the prejudice of an adverse adjudication.

Upon all the matters of account mentioned in this section, a case must be made before the master, such as, under the former practice, required to be made upon the pleadings, to authorize the court to make a decree upon them. Reference to the cases which determine liability upon the pleadings is therefore necessary to ascertain the extent and the limits of the master's power. It is proposed to note them upon the several matters referred to in this section in the order in which they are mentioned.

#### I. AS TO TAKING ACCOUNTS WITH RESTS.

There is some ambiguity in the meaning of this phrase. Formerly it seems to have been considered as nothing more than ascertaining the amount due at specified times from an accounting party, but not necessarily involving the amalgamation of principal with interest, or turning the interest into capital,—in which sense it was little more than an enquiry to ascertain balances. But the technical meaning it has now acquired may be expressed as, a statement of the amount due at specified times, including both principal and interest, and the sum so found due forms the principal upon which interest is to be calculated,—or in other words it charges the accounting party with compound interest, *Raphael v. Boehm*, 11 Ves. 92; *Bennett's Practice in the Master's office*, 136.

Rests most frequently occur in accounts against (1) executors and trustees, and (2) in accounts against mortgagees.

##### (1) *In accounts against executors and trustees.*

The following rules appear to be the result of the cases, but it is impossible to state any rules which will reconcile all the cases and be consistent with themselves. (a) Executors and trustees retaining balances in their hands, in neglect merely of the duty imposed by law, will be charged with simple interest only;—(b) But if the instrument creating the trusts direct an accumulation of the funds, the neglect to invest will be considered as a positive breach of trust, and rests ordered;—(c) If the trustee have employed the funds in trade or for his own benefit, whether there be a direction for accumulation, or not, the *cestui que trust* has the option of taking the profits of the employment of the fund, or of charging him with interest and rests. In this class of cases great doubt still exists whether rests will be directed as a matter of course, or whether it does not require a special case of misconduct

to charge more than simple interest, but the better opinion seems to be that where an account of profits might be had, rests will be directed, and lastly (d) in cases of fraud rests will be made.

The court in England is further in the habit of modifying the charge against the accounting party, according to the various degrees of culpability, by charging different rates of interests. In simple cases of neglect, 4 per cent is the usual rate, while if the neglect amount to a breach of trust, or be accompanied with misconduct, 5 per cent is imposed. In this Province no such practice prevails, and when interest is calculated it is the usual legal rate—6 per cent—whether the account be taken with rests or not. These different rates in England require to be continually borne in mind when reading the cases on the subject, as will be observed by the frequent reference to them in the cases cited below.

(a) *In cases of neglect merely of a legal duty, simple interest is charged.*

If an executor keeps money in his hands without any necessity from the circumstances of the estate or fund, he will be charged with interest, but usually, in England, only at 4 per cent, unless it appears that more might have been made of it, and then he will be charged with what might have been made, *Forbes v. Ross*, 2 Cox 116. In that case the trustees were authorized to lay out the fund in lands or on personal securities at such rate of interest as they should deem reasonable. They exercised this authority by lending to one of themselves, the security was ample, and the borrowing trustee used the money by lending at 5 per cent, but claimed that from losses in loans he did not realize more than 4 per cent, but the trustees admitted that five per cent might have been made by investing in government securities or on mortgages, and Lord Thurlow charged them 5 per cent.

In *Roche v. Hart*, 11 Ves. 58, where it only appeared that the executor had not brought the money into court, as he ought to have done, but it was not shewn that he had derived any benefit from it, Sir W. Grant charged him with simple interest at 4 per cent.

The rule is stated in the same way by Lord Eldon in *Mosley v. Ward*, 11 Ves. 581. "The court does not usually give more than four per cent where the money has been called in for the purposes of the will and the balance only has been in his hands."

Sir Thomas Plumer, V. C. in *Tebbs v. Carpenter*, 1 Mad. 290, says, "a distinction has been taken, as in every moral point of view there ought to be, between negligence and corruption, in executors. A special case is necessary to induce the court to charge executors with more than four per cent upon the balances in their hands. If the executor has balances which he ought to have laid out, either in compliance with the express directions of the will, or from his general duty, even where the will is silent on the subject, yet if there be nothing more proved in either case, the omission to lay out amounts only to a case of negligence, and not of misfeasance." This statement of the rule as it respects non-compliance with the express directions of the will, has not been approved by later judges, but as to the

effect of non-compliance with the general duty of the executor it is correct.

And Sir J. Romilly, M. R., in *Jones v. Fozall*, 15 Beav. 892, states the general rule thus; "If an executor has retained balances in his hands which he ought to have invested, the court will charge him with simple interest at 4 per cent on the balances; if in addition to such retention he has committed a direct breach of trust, or if the fund has been taken by him from a proper state of investment in which it was producing five per cent. he will be charged with interest after the rate of 5 per cent.

(b) *If the instrument creating the trust direct an accumulation or investment or application of the fund, the neglect to comply with it will be considered a positive breach of trust and rests ordered.*

In *Raphael v. Boehm*, 11 Ves. 92, a testator gave to his executors a legacy to be in full for their trouble in performing the duties in his will, and directed that they were not to derive any advantage from keeping money in their hands, and that the surplus of his estate should be accumulated for the benefit of legatees. At his death more than £30,000 came to the hands of the executors, which for 13 years they retained. Lord Loughborough charged them 5 per cent from the time of receiving the moneys, commencing at the death of the testator, and half-yearly rests. The master in taking the accounts under this decree, computed interest upon each receipt from the day it was received, the balance of receipts, with interest so calculated, and payments being struck at the end of each half-year; and that balance so composed of principal and interest being carried forward as an item in the account, producing interest. Lord Eldon thought the decree unusually severe, but under the facts of the case would not refuse to give it effect. He says, (p. 107) "Where there is an express trust to make improvement of the money, if he will not honestly endeavor to improve it, there is nothing wrong in considering him, as the principal, to have lent money to himself upon the same terms, upon which he could have lent it to others, and as often as he ought to have lent it, if it be principal; and as often as he ought to have received it, and lent it to others, if the demand be interest, and interest upon interest. The court would shamefully desert its duty to infants by adopting a rule, that an executor might keep money in his hands without being accountable as if he had accumulated."

In *Knott v. Cotte*, 16 Beav. 77, the executor was directed to invest in British stock or upon real security and accumulate the surplus after maintaining infants. He invested in foreign funds,—and was charged 4 per cent with annual rests. The M. R. saying, (p. 79) "The case must either be treated as if these investments had not been made, or had been made for his own benefit out of his own moneys, and that he had at the same time retained moneys of the testator in his hands. The usual course is to charge an executor with 4 per cent where he has simply retained balances; but where he has acted improperly or has employed the trust money in

trade for his own benefit, or has been guilty of other acts of misconduct, the court visits him with interest at 5 per cent. In this case there does not appear to me to have been any such misconduct as to make him answerable at 5 per cent. It appears simply a case in which an executor has retained moneys which he has not properly invested."

In *Jones v. Foxall*, 15 Beav. 388, there was a trust to call in a sum of money and invest in government or real securities. The trustee permitted the fund to remain in the hands of a trading firm, of which he was a member, for 16 years, and he was charged 5 per cent with annual rests. Here was not only a positive breach of trust in neglecting to comply with the directions of the will, but also the employment of the funds for his own benefit.

In *Townend v. Townend*, 1 Giff. 201, the same principle was acted on by V. O. Stuart, and he gave compound interest on an infant's legacy, at 5 per cent, which the executors had not invested properly pursuant to the directions of the will. See also *Wilson v. Peake*, 3 Jur. N. S. 155.

Considerable discussion has taken place as to the propriety of the rule by which these varying rates of interest are charged. The additional rates are sometimes said to be imposed by way of penalty, irrespective of the fact whether they have been received or not,—to this it has been replied, why not impose an additional sum of principal which has not been received as well as interest which has not been received. And it is said that the court ought to charge the executor only with the interest which he has received, or which it is justly entitled to say he ought to have received, or which it is so fairly to be presumed that he did receive that he is estopped from saying that he did not receive it; and acting upon such reasoning, Lord Cranworth, in *Attorney-General v. Alford*, 4 DeG. M. G. 843, charged an executor with 4 per cent simple interest only although he had neglected to apply the fund as directed by the will. It appearing that the executor had not in fact derived a benefit from the money, although grossly neglecting his duty. But this case cannot be considered as laying down a general rule of that kind, for although the decree of the vice-chancellor was varied by the chancellor from 5 per cent with annual rests to 4 per cent simple interest yet the defendant, was ordered to pay the costs, although not so charged by the decree, nor was the decree appealed from on that ground. And in the *Mayor &c. of Bervick v. Murray*, 7 DeG. M. G. 519, the same chancellor disclaims having intended to declare in *Attorney-General v. Alford*, that defaulting trustees should in no case be charged more than 4 per cent, and there charged the defendant 5 per cent.

- (c) *If the trustee has employed the trust funds in trade, or for his own benefit, whether there be a direction for accumulation, or investment, or not, the cestui que trust has the option of taking interest and rests, or the profits of the employment of the fund.*

Where a trustee employs trust funds in trade he renders himself liable to be charged with ordinary trade interest. It will be presumed that his



accounts have been taken in the ordinary way in which commercial accounts are taken, viz., with 5 per cent interest, made up annually, and therefore with rests, *Penny v. Avison*, 3 Jur. N. S. 62, V. C. Wood.

In *Williams v. Powell*, 15 Beav. 461, the executor had engaged in trade and mixed the trust fund with his own money at his bankers, and he was charged 5 per cent, compound interest. And in *Heighington v. Grant*, 1 Ph. 600, n. a. where the executor had employed the trust money in his business as banker and shopkeeper, he was made to account with 5 per cent compound interest.

Many decrees have no doubt been made formerly under such circumstances charging only simple interest, but the cases above cited, it is believed, indicate the practice of the court at present. Thus in *Heathcote v. Hulme*, 1 J. & W. 122, simple interest only, seems to have been charged. In *Walker v. Woodward*, 1 Russ. 107, compound interest at 5 per cent. was given, but the order there is said to have been obtained by surprise, per Mr. Sugden in *Attorney-General v. Solly*, 2 Sim. 518, and in the last cited case simple interest only was given.

But besides the right of the *cestui que trust* to interest with rests in these cases, he has also the option of taking the profits realized from the employment of the fund, instead of interest, and this is an option he may properly enough insist upon before the master, under an ordinary decree, and the very extensive language of this order. If he be entitled to rests, he would seem entitled to take the substitute for them.

*Docker v. Somes*, 2 M. & K. 655, is the leading case upon this subject, and the judgment of Lord Brougham contains an admirable exposition of the principles on which it rests. The right may arise either upon the ground of ownership, or of breach of trust; it is placed on this latter ground chiefly by Lord Brougham, "When a trustee or executor has used the fund committed to his care in stock speculations, though the loss if any must fall upon himself, yet for every farthing of profit he may make, he shall be accountable to the trust estate. So it is also, where one not expressly a trustee has bought or trafficked with another's money, the law raises a trust by implication, clothing him though a stranger, with the fiduciary character, for the purpose of making him accountable." And, were it not for the inconvenience attending the working of such a decree, it would seem the most reasonable way of taking the account. Fixing a specific rate of interest, in lieu of profits, is obviously only guess work; all estates, in that way, must benefit equally, though the profit, and the risk, may be infinitely varied.

In *Palmer v. Mitchell*, 2 M. & K. 672, n, Sir W. Grant decreed an account of profits arising from the employment of the funds in trade, and in *McDonald v. Richardson*, 1 Giff. 81, a like decree was made. V. C. Stuart stating the rule to be, that where an executor employs assets in carrying on a trade without authority he is bound to account for, and pay over, all the profits, or he may be charged with interest at the option of those beneficially entitled.



In the simple case of an employment of trust funds in a separate and distinct trade or adventure, there cannot be much difficulty in ascertaining the profits, but when the executor or trustee employs them in his own business, mixing them with his own money, or in a partnership of which he is a member, the question becomes much more complicated.

There is no general rule, by which the proportion of the profits, that the owners of the fund are entitled to, can be ascertained; each case must depend upon its own circumstances.

In *Crawshaw v. Collins*, 15 Ves. 218; 1 J. & W. 267; 2 Russ. 325, a partnership had been dissolved by the bankruptcy of one partner, who was entitled to 3-8ths of the capital and profits of the business, and his assignees were held to be entitled to a like share of the profits of the continuation of the business after the bankruptcy, and of the money to be produced by the sale of what remained in specie of the capital and stock, and it was also held, in that case, that the assignees' share of the profits was not to be lessened, in respect of a debt which the bankrupt owed to the partnership. But Lord Eldon, (2 Russ. 344) guards himself from laying down a rule to apply to all cases. He says, "After a very anxious consideration of this subject, I believe that it will be found, that the rule which is to be applied must be deduced in almost every case, from the particular circumstances of that very case."

Another leading case upon this subject is *Willet v. Blanford*, 1 Hare 253; Willett & Blanford carried on the business of picture-frame makers, Willett being entitled to 7-10ths of the profits and Blanford to 3-10ths. They afterwards carried on another business in which they shared the profits equally. Willett died and appointed Blanford one of his executors, who carried on the business without withdrawing from the concern the share of Willett. On a bill filed by legatees of Willett, seeking to make Blanford account for the profits in the same proportion as they had been divisible during the life of the two partners, V. C. Wigram says, "I decided, at the conclusion of the argument, that the surviving partner, one of the executors of the testator, having carried on the partnership trades without withdrawing therefrom the testator's property, was liable in equity to account to his estate for some portion of the profits made in each of these trades since the testators' death. It was strongly urged upon me that I ought at once to declare that the testator's estate was entitled to 7-10ths of the profits made since his death, in the trade of picture frame maker, and to a moiety of the profits of the other trade. I am of opinion that there is no rule of this court applicable alike to all cases, and that there is no rule, which is so established or general in its application, that it is to be taken to be the general rule until circumstances are shown which displace it. The facts of each case must be fully brought under the view of the court before it can be in a position to state what justice to the party seeking its protection may require, with due regard to the interests of other parties. The circumstances of some cases would almost exclude the possibility of making a decree in any other form than that

which the plaintiffs claim in this case. Take for example, the case suggested by Lord Eldon, in *Crawshay v. Collins*, of the mere conversion into money at a large profit, long after the testator's death, of the very property which belonged to the partnership at his death, and no other circumstance to embarrass the question. Again, the dissolution of a partnership *prima facie* prevents new contracts being made on the joint account of the partners, but it necessarily leaves the old contracts of the partnership to be wound up. In the absence of circumstances to alter the case, it would be impossible to deny the right of the estate of a deceased partner to participate in the profits arising from winding up the old concerns; and if, in such a case, the surviving partners should have so mixed up new dealings with the old, that the two could not be separated, the right of the estate of the deceased partner to share in the profits of the new dealings might unavoidably attach. Again the whole or the substantial part, of a trade may consist in good will leading to renewals of contracts with old connexions. In such a case, it is the identical source of profit which operates both before and after dissolution; and this appears to me to be the ground work of Lord Eldon's reasoning in *Cook v. Collingridge*. Circumstances may be suggested of a very different kind. Take the case of a business in which profit is made by the personal activity and attention with which the use of the money capital is directed, and the case may require a different determination. Or there may be the case of two persons being partners together in equal shares; one finding capital alone, and the other finding skill alone, and suppose the latter, before his skill had established a connexion or good will for the concern, should die, and the survivor, by the assistance of other agents, should carry on the concern upon the partnership premises, it could scarcely be contended after a lapse of years, that the estate of the deceased partner was entitled as of course to a moiety of the profits made during that lapse of time after his death; and if his estate would not be so entitled where the deceased partner had left no capital, it would be difficult to establish a right to a moiety, only because he had some small share of the capital and stock in trade engaged in the business at his death, without reference to its amount and the other circumstances of the case." V. C. Wigram considered himself "bound by authority and reason to hold that the nature of the trade, the manner of carrying it on, the capital employed, the state of the account between the partnership and the deceased partner, at the time of his death, and the conduct of parties after his death, may materially affect the rights of the parties."

In *Simpson v. Chapman*, 4 DeG. M. & G. 154, a testator was a member of a partnership at will in a bank, without any provision entitling the executor of a deceased partner to an interest in the good will of the concern. The credit in which the bank was, rendered capital unnecessary, and at the testator's death the property of the concern exceeded its liabilities by a very small amount, the testator's share in which was far exceeded by the balance due from him to the bank on his private account as a customer. After his death the surviving partners admitted into the firm his son, who was his

executor, but who was not admitted into the firm in that character, and the business continued to be carried on without any separation or appropriation of the partnership assets as they existed at the testator's death. In a suit against the executor, for the administration of the testator's estate, it was held that he was not accountable for the profits which he had received as a partner in the bank.

Lord Justice Turner expressed his entire concurrence in the opinion expressed by V. C. Wigram in *Willett v. Blanford*.

*Wedderburn v. Wedderburn*, 22 Beav. 84, is one of the most recent cases in which this subject has been discussed.—Sir J. Romilly, M. R., acted upon the principles enunciated in *Willett v. Blanford*, and *Simpson v. Chapman*, and finding that at the testator's death, the surplus was merely nominal, that the business to wind up was insolvent, and that the subsequent profits were attributable to good will, (which by agreement belonged to the survivors,) and the personal exertions and capital of the surviving partners, refused to give the representatives of the deceased a participation in the profits, as far as those profits were attributable to the good will and connexion in trade of the old firm, and that their share in that portion of the profits in which they would be entitled to participate could not be estimated higher than the interest which had been paid.

Where an infant *cestui que trust* is interested, an enquiry will be made whether it is for his advantage to take interest or profits, *Burden v. Burden*, cited in *Heathcote v. Hulme*, 1 J. & W. 122. And this enquiry would seem to be within the province of the master under an ordinary decree.

(d.) *In cases of fraud rests will be made.*

Only one case need be referred to, if so much be necessary, to show that a person, who has fraudulently retained money in his hands, must account for it with compound interest.

*Stacpoole v. Stacpoole*, 4 Dow 209, administration was taken out in 1771, distribution to a certain extent made, but a large sum retained on unfounded pretences. No effectual suit against the administrator till 1792, and that protracted, in a great measure, by the administrator's fault, in the court below till 1810. It was held by the House of Lords, reversing, in that respect decrees of the Irish Chancery, that, notwithstanding the lapse of twenty years before effectual suit for account commenced, the administrator ought to be charged with the full legal interest on the sum remaining undistributed, during the whole period of retention; and that the account should be taken with annual rests, and the interest be charged on the annual balances.

(2.) *As to rests in accounts against mortgagees in possession.*

In this case where the receipts of the mortgagees are more than sufficient to cover the interest, the annual surplus will be considered as applicable, in reduction of the principal money, which is called taking the account with rests, *Fisher on Mortgages*, s. 920; applying the surplus in reduction of the principal bearing interest, is obviously equivalent to calculating interest on the surplus.

Accounts cannot be taken in this manner, in England, without an express direction in the decree, and a decree to that effect can only be made upon allegations in the pleadings, *Webber v. Hunt*, 1 Madd. 18; *Neeson v. Clarkson*, 4 Hare 97. The section of the order now under consideration, however, authorizes the master to make the rests without a direction in the decree and without a case being made upon the pleadings to justify them.

The principal upon which rests are made against mortgagees, is that he is not bound to receive payment of his debt in dribblets, but he has the right to do so if he thinks fit. If he enters into possession when no arrear of interest is due, he evidences his intention so to receive payment of the debt, and the account therefore goes with rests; but if the interest is in arrear when he enters into possession, the fact of his taking possession affords no evidence of his intention to receive payment by dribblets, as he is driven to take the possession by the non-payment of the interest, and the account therefore goes on till the whole debt has been satisfied. Per Lord Justice Turner in *Nelson v. Booth*, 3 DeG. & J. 119.

If the interest be in arrear when possession is taken, rests are not made, *Davis v. May*, 19 Ves. 384; *Coop. 238*; *Wilson v. Cluer*, 3 Beav. 136; *Coldwell v. Hall*, 9 Grant 110; and if not liable to account with rests when the possession is taken, the mortgagee does not become so liable until the whole of the mortgage debt has been paid off, *Wilson v. Cluer*; *Davis v. May*, *supra*. He does not become so liable merely by the interest and arrears being paid, *Finch v. Brown*, 3 Beav. 70; *Latter v. Dashwood*, 6 Sim. 462.

Where the mortgagor had, before the mortgagees entered into possession, indorsed to them bills of exchange for the arrears of interest; the bills fell due after the possession was taken and were dishonored, and it was held that the interest was in arrear when possession was taken, so as to preclude the mortgagor from claiming to have the accounts taken with rests, *Doobson v. Land*, 4 DeG. & S. 575.

If the mortgagee in the exercise of his legal right choose to go into possession, when there is no interest in arrear, he must account with rests, *Robinson v. Cumming*, 2 Atk. 410; *Nelson v. Booth*, *supra*, unless he have been driven, by the acts of others, to take possession and his own conduct has been free from harshness or oppression, *Horlock v. Smith*, 1 Coll. 287. When a mortgagor stated an account with the mortgagee in possession, by which it appeared either that no interest was due, or that any which was due was satisfied as interest, by being converted into principal, and the mortgagee continued in the receipt of rents of amount more than sufficient to satisfy the interest of such principal; the settlement was continued as a rest made by the parties themselves, and that the mortgagee retaining the possession with no interest due to him, was to be dealt with as a mortgagee who takes possession without interest being in arrear, *Wilson v. Cluer*, 3 Beav. 136.

Rests will also be made where the title of the mortgagor is denied. For when a creditor denies his character as such, and claims as owner, he will

not be allowed to fall back on his original character of creditor, as if he had never departed from it, *Incorporated Society, &c., v. Richards*, 1 Dr. & W. 258, 334. In *Aitchison v. Coombes*, 6 Grant 643, where the defendant claimed to be a purchaser for value without notice, which was disproved, the decree, unnecessarily perhaps, directed the account to be taken with rests; this point is not noticed in the report. In like manner in *Montgomery v. Calland*, 14 Sim. 79, the plaintiff sought to redeem against a mortgagee in possession, who by his answer set up an unfounded claim to the equity of redemption, and denied that the mortgage had been satisfied, although a balance was due from him when he filed his answer, the mortgagee was ordered to pay interest on the balances in his hands since the time when the mortgage was satisfied, besides portions of the costs.

Although the mortgagee when he took possession may not have been liable to rests, yet when by the receipt of rents or otherwise, the whole debt became satisfied, rests will be made from that time, *Wilson v. Metcalfe*, 1 Russ. 530; *Lloyd v. Jones*, 17 Sim. 491, in this last case the mortgagee was paid by the receipt of rents and profits pending the proceedings in the master's office under a decree to redeem.

When the mortgagee is himself in the occupation of the premises, and is charged with an occupation rent more than sufficient to pay the interest, he will be charged with rests, if possession were taken when no interest in arrear, or if he is paid off by means of the occupation rent, *Wilson v. Metcalfe*, 1 Russ. 530; *Binnington v. Harwood*, T. & R. 477. If a mortgagee, receiving the rents of the mortgaged estate, after his debt has been satisfied, does not immediately pay them over to the mortgagor, but retains them to his own use, he is availing himself of another man's money and ought to be charged with interest. Is his situation substantially different when he is in the actual occupation of the mortgaged premises? Though he is not in receipt of rent, he is in fact in receipt of profits; and these he keeps in his pocket. Per *Lord Gifford*, M. R. 1 Russ. 535.

There seems to be some doubt as to the proper mode of making the rests when sums have been received between the dates of the rests. In *Binnington v. Harwood*, *supra*, sums so received were applied, when they exceeded the interest, to sink the principal. Mr. Fisher in his work on mortgages appears to think that this depended on the usury laws, and that since their repeal the rests would not be so made unless for special reasons. Sir Thomas Plumer does not place the decision upon that ground, and it would appear to be only in conformity with plain justice, that the rests should be made whenever the receipts exceeded the interest. But whatever may be the technical mode of working a decree ordering annual rests, it is apprehended that the master under this order is fettered by no such difficulty, and that the true mode of taking the account is to treat the time of every payment, which exceeds the interest, as the period for making the rest.

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II. THE NEXT AUTHORITY IN ORDER BY THIS SECTION CONFERRED UPON THE MASTER IS "TO TAKE ACCOUNT OF RENTS AND PROFITS RECEIVED, OR WHICH, BUT FOR WILFUL NEGLECT OR DEFAULT, MIGHT HAVE BEEN RECEIVED."

It is obvious that this authority is in terms confined to accounts against persons in the possession or occupation of real estate.

The cases which most frequently occur for considering the subject of liability for wilful default, are those of mortgagees, trustees, and wrong doers.

In the case of a mortgagee in possession, it is a matter of course to charge him with rents and profits received, or which but for his wilful default might have been received. A mortgagee when he enters under a condition, imposed on him by the court, of exercising the utmost diligence for himself and the mortgagor, *Sherwin v. Shakespear*, 5 DeG. & M. G. 531, 536. A mortgagee, when he enters into possession of the mortgaged estate, enters for the purpose of recovering both his principal and interest, and the estate being in the eye of the court a security only for the money, the court requires him to be diligent in realizing the amount which is due, in order that he may restore the estate to the mortgagor, who in the view of the court is entitled to it; it is part of his contract that he should do so, per L. J. Turner, in *Kensington v. Bouverie*, 7 DeG. M. & G. 157.

The acts which amount to wilful default, to charge a mortgagee must be either fraudulent, or grossly negligent. Actual fraud is not necessary. It is sufficient, if there is plain, obvious, and gross negligence, but not making use of facts within his knowledge; so as to give the mortgagor the full benefit, that the mortgagee in possession of the estate of the mortgagor ought to give him. If, for instance, the mortgagee turns out a sufficient tenant, and, having notice that the estate was underlet, takes a new tenant; another person offering more; an offer, however, not to be rashly accepted. Per Lord Erskine in, *Hughes v. Williams*, 12 Ves. 493.

The true doctrine of the Court is, that a mortgagee in possession of the mortgagor's property, is bound to use it as carefully as if it was his own. Per V. C. Stuart in, *Cocks v. Gray*, 1 Giff. 77. But he is not required to do more, and therefore in the last case, where the defendant was mortgagee in possession of a livery stable, which he rented to a tenant from year to year, and the rent being in arrear, he distrained several carriages and horses, belonging to different noblemen and gentlemen which were standing at livery. But, upon receiving notice from the owners that, unless they were restored to their owners, proceedings would be taken against him, he gave them up, and it was held that he was not chargeable for wilful default, in declining to defend an action of replevin. That the mortgagee was not bound to distrain, and that having distrained the property of third persons upon the premises, he acted prudently in declining to embark in the litigation; that the Courts of law gladly caught at any distinction to escape from the harsh rule of law, which permits landlords to seize the property of other persons found on their premises.

This decision apparently rests on the doubtfulness of the right to distrain



horses and carriages standing at livery, and the apprehension that the mortgagee might have had a verdict against him. For if the right were perfectly clear, it is difficult to understand why the mortgagee should not have accounted for them, yet the right to distrain, in such cases, seems to have been expressly sanctioned in *Parsons v. Gingell*, 4 C. B. 545.

No account of past rents will be taken against a mortgagor in possession, at the instance of a mortgagee, *ex parte Wilson*, 2 V. & B. 252; and if a first mortgagee be in possession, without notice from the second mortgagee, he may pay the rents over to the mortgagor; and the second mortgagee, if he is so imprudent as not to give that notice, as he cannot have an account of the by-gone rents from the mortgagor, so he cannot have it from the other mortgagee. Per Lord Eldon, *Berney v. Sewell*, 1 J. & W. 650.

Trustees, whether express, or constructive, are not, like mortgagees in possession, liable to account, as of course, for wilful default,—a special case of fraud, misconduct, or gross negligence, requires to be established against them.

"In the case of vendor and purchaser, as by the contract the vendor becomes trustee of the estate for the purchaser, if the vendor remain in possession during the interval when the title is in dispute, he will like other trustees be liable to account for the rents and profits, and upon a proper case, be charged with wilful default. The vendor may call for interest upon his purchase money, although the vendor has suffered it to lie dead. Then, to pursue that principle, must not the vendor, the legal owner of the estate, by a parity of reasoning, take care of the purchased estate? He must. If he has received rent, he must account for it; if he has suffered tenants to run in arrear, he is responsible for the loss thereby occasioned. If possession of the estate was given, or any tender of possession was made, or the purchaser exercised acts of ownership over the premises, that may make a difference." Per V. C. Plumer, *Acland v. Gaisford*, 2 Madd. 28.

In *Wilson v. Clapham*, 1 J. & W. 36, a decree for specific performance had been made with a direction for the vendor to account for rents and profits; and a motion was made to vary the minutes so as to charge him further with what but for his wilful default he might have received, upon a suggestion that they had been suffered to run in arrear. And Sir Thomas Plumer, then M. R. directed enquiries to ascertain if the vendor had been in default, observing, "The care of the estate must of necessity belong to the vendor," the title being such that it was not safe, before the decree, for the purchaser to take possession, he becomes trustee for the purchaser, and what hardship is there in expecting him to take the same care of it as he would if it were his own? He must take the measures that are adopted by every prudent landlord. If ultimately the estate is determined to continue his own, he retains the rents; if not, he hands them over to the vendee.

Where the purchaser refuses to take possession when he might and



ought to have done so, he cannot make the vendor answerable for remaining in the possession of the premises, *Dakin v. Cope*, 2 Russ. 170.

L. J. Knight Bruce, observed in *Sherwin v. Shakspear*, 5 DeG. M. & G. 517, 531. "My impression from the course of the court (as far as I have been acquainted with it) and upon principle, is, that a special case ought to be made for the purpose of inserting those words (charging wilful default) in a decree for specific performance, where the vendor has been in possession during a time, in which he is to account for the rents," and L. J. Turner, observes in the same case, p. 536, "There is a vast distinction between the position of a vendor and that of a mortgagee who enters into possession of the estate,—in the case of a vendor, the vendor does not take but remains in the possession of the estate. It may ultimately appear that the estate of which he is in possession may never become the estate of the purchaser at all, and I think that if he continues in the due and ordinary course of management, it is not the course of this court to charge him, upon the principle of his having been converted into the position of a mortgagor for the purchase money."

In the case of *Martin v. Norman*, 2 Hare 596, on a bill by the vendor for specific performance, the decree charges the plaintiff with the rents received or which, but for his wilful default, he might have received. The facts are not given at much length, and this point does not seem to have been argued, as the report is confined to a discussion on the effect of a "traversing note," but so far as the report does go, there seems no ground for a decree of this nature, and it cannot be considered as an authority, in opposition to the cases cited above.

In those cases in which a purchaser for value is evicted by a better title, of which he had notice, he is considered as a trustee for the true owner, and is not, in the absence of special circumstances, chargeable for wilful default, *Howell v. Howell*, 2 M. & C. 478.

In that class of cases where deeds or contracts have been obtained by fraud or misrepresentation, and possession taken under them, the same rule applies, although the reason for it may not be apparent. Perhaps it may be on the ground that the person in possession assumed to be owner, and will, in the absence of evidence to the contrary, be considered as dealing with the estate, as a provident owner would.

Whatever may be the reason, the authorities are numerous, that he cannot be charged in this stringent mode without a special case, *Murray v. Palmer*, 2 Sch. & L. 474; where a conveyance was obtained from a woman in ignorance of her rights, and upon misrepresentation of the circumstances of the property, was set aside; but Lord Redesdale refused to charge him with what, but for wilful default, he might have made, *Masters v. Braban*, Seton (2nd. Ed.) 307; where Braban got into possession and claimed under a forged declaration of trust, yet was only charged with rents and profits received, *Trevelyan v. Charter*, 4 L. J. N. S. 209; 11 Cl. & Fin. 714; 9 Beav. 140; where a purchase by a solicitor was set aside, the decree only directed him to account for rents received, *Seton* (2nd. Ed.)

302; *Nevills v. Nevills*, 6 Grant 121; a conveyance fraudulently obtained by a son from his father was set aside, but the decree only ordered the son to account for rents received.

The executor of a person who has obtained and held possession, under an erroneous idea of title, is liable to account to the true owner, for the rents and profits during the testator's possession, *Monypenny v. Bristow*, 2 R. & M. 117.

A testamentary guardian, *Mathew v. Brise*, 14 Beav. 341; and a statutory guardian, *Duke of Beaufort v. Berty*, 1 P. Wms. 704; are trustees and must account in the ordinary way, and will not be liable for wilful default except upon a special case.

As to mere wrong-doers there are not many cases in which they are liable at all to a suit in Equity, the remedy against them being a legal one, but when a person enters upon an infant's estate he is treated in Equity as his bailiff, *Newburgh v. Bickerstaffe*, 1 Vern. 295; *Bloomfield v. Eyre*, 8 Beav. 250; *Hicks v. Sallitt*, 3 DeG. M. & G. 782; and it is apprehended that the decree in such a case is only for the ordinary accounts.

But to entitle the infant to an account he must have been in possession by himself, his guardian, or agent, *Crowther v. Crowther*, 28 Beav. 305.

As to the time for which an account of rents may be had, it is to be noticed, that prior to this order, if the statute of limitations were intended to be insisted on as a bar to the account, it required to be set up in the pleadings; but now the whole contest is transferred to the master's office.

The 22 Vic. c. 88 s. 19; *Con. Stat. U. C.* p. 873; the same as the *Imp. Act*, 3 & 4 W. 4, c. 27, s. 42; enacts that no arrears of rent or of interest in respect of any money charged upon, or payable out of any land or rent, &c., shall be recovered by any action or suit but within six years next after the same shall have become due, or after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent signed by the person by whom the same is payable, or his agent.

The statute however, does not apply to cases of express trusts, until the lands or rent shall have been conveyed to a purchaser for value, nor in cases of concealed fraud, *Con. Stat. U. C.* p. 876, s. 32, 33; *Imp. Stat.* s. 25, 26.

In case of disability, ten years are allowed next after the ceaser of it, *Con. Stat. U. C. Jr.* 879, s. 45; *Imp. Stat.* s. 16.

These provisions are considerably modified by the Dormant Equities Act, *Con. Stat. U. C.* p. 58, s. 59, 60; which enact that no title valid at law shall be disturbed or affected in Equity by anything which arose before the 4th of March, 1837, unless in the case of actual and positive fraud in the party whose title is sought to be disturbed,—and in regard to any other claim which arose before that date, the Court shall make such decree as may appear just and reasonable if the suit be brought within 20 years from the accrual of the right and no further time shall be allowed for disability. This act has been held to apply to cases of express trust, *Beckett v. Wragg*,

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7 Grant 220; *Attorney General v. Grasett*, 8 Grant 180; but, see *Tiffany v. Thompson*, 9 Grant 244.

Where an infant six years after attaining his majority seeks an account against his guardian for arrears of rent, it was at one time held that he was barred by the statute 21 J. 1, c. 16 s. 3; *Lockey v. Lockey*, *Pre. in Chy.* 518; but in *Mathew v. Brise*, 14 Beav. 841, it was held otherwise, and in *Hicks v. Sallitt*, 3 DeG. M. & G. 782, where the claim was made against a purchaser for value with notice, it was held that a suit for such an account was not within the 42nd Sec. of the Imp. Act (19 *Sec. Prov. Act, supra*) and an account was decreed for the whole period of the wrongful possession, and see *Grant v. Ellis*, 9 M. & W. 113.

III. THE NEXT SUBJECT IN THIS SECTION UPON WHICH THE MASTERS ARE AUTHORIZED TO ADJUDICATE, IS THAT OF SETTING AN OCCUPATION RENT.

This is a sum to be fixed as an equivalent for having occupied lands, &c., in respect of which there is no subsisting agreement, or none binding upon the owner to pay a definite rent, and to which the occupant is not entitled for his own benefit, *Bennett's Prac.* 176. To charge a person with an occupation rent he must have been in the occupation of the property, and as it is equivalent to making him answerable as for wilful default, it is, under the practice in England, requisite to allege the occupation in the bill, and that a direction should be inserted in the decree before the master or chief clerk can so take the account. Mr. Bennett says, "there are few questions more contested where such an one arises before the court as to the liability to be charged, and the contest is generally transferred to the master's office as to the *quantum* of rent to be assessed." By this not very lucid sentence, he probably meant that the *quantum* of rent was usually the subject of great contest in the master's office; for the liability to be so charged is not a question of much difficulty. The mere fact of occupation is all that is necessary to be proved in order to establish the liability of a mortgagee or trustee to be so charged.

The cases in which the subject of occupation rent usually arise are those of mortgagees or trustees, but is not confined to these, and it may be said generally that whenever a person is in the occupation of property to the possession of which another is entitled, the occupant may become liable to be charged with an occupation rent.

Mortgagees are charged with an occupation rent if they have been in the actual occupation of the mortgaged property, but an occupation of a part is not considered as occupation of the whole, and he will only be so charged as to the part he has occupied, and account for the rents and profits received, or which, without wilful default, he might have received, of the remainder, *Trulock v. Robey*, 15 Sim. 265; *York Buildings Co. v. McKensie*, 8 Bro. P. C. 70.

A doweress is entitled to have an occupation rent charged against the heir in occupation, but only for six years before the filing of the bill, *Bamford v. Bamford*, 5 Hare 203, 206.

A vendor in occupation under such circumstances as would have rendered him liable to an account of rents, &c., had he been merely in possession, will be so charged, but not if the purchaser might and ought to have taken possession, *Dakin v. Cope*, 2 Russ. 170.

Express trustees or constructive trustees in occupation of property acquired by fraudulent means, will be charged with an occupation rent, *Lamont v. Lamont*, 7 Grant 258, 269; *Mill v. Hill*, 3 H. L. C. 828; *Ex parte James*, 8 Ves. 351.

Where a person in occupation of property which he had conveyed absolutely to one member of the firm, but which he alleged to be only by way of security, for a debt due to the firm, and after the institution of a suit between the partners, obtained leases from the partner having the legal estate, an occupation was ordered to be fixed, *Prentiss v. Brennan*, 2 Grant 18.

In a suit for partition by one tenant in common against another, who had occupied the property, and excluded the plaintiff and denied his right, the defendant was charged with an occupation rent for (the plaintiff's share) one-third of the estate, *Pascoe v. Swan*, 21 Beav. 508.

The chief difficulty in such cases is to ascertain what amount should be assessed as the rent, and the evidence adduced requires to be very carefully scrutinized. Architects, surveyors, and house and land agents, it is well known are very subject to a bias in favour of the person who calls them as witnesses, so much is this the case that it has been said, any value absurdly great, or as absurdly small, can be authenticated by their evidence, though upon oath. Farmers or persons in the neighbourhood not unfrequently have a leaning to the occupant and tend to place as small a sum as possible as the value. The safest guide, no doubt, is the rental value, if that can be ascertained, from actual offers, or the testimony of disinterested witnesses. In many cases a view by the master is of importance, although his conclusion cannot rest upon his inspection, yet it enables him to apply the evidence in a more satisfactory manner than he can possibly do from the mere description of the witnesses.

IV. THE MASTER IS FURTHER AUTHORIZED TO TAKE INTO ACCOUNT NECESSARY REPAIRS, AND LASTING IMPROVEMENTS, AND COSTS AND OTHER EXPENSES PROPERLY INCURRED OTHERWISE, OR CLAIMED TO BE SO.

Mortgagees in possession are allowed sums laid out by them in necessary repairs and lasting improvements, with interest on them at the same rate that the mortgage bears, *Hoare v. Newland*, Seton (2nd Ed.) 188; *Knowles v. Chapman*, *Ib.* 225, and see *Ib.* 200; *Quarrell v. Beckford*, 1 Mad. 278; *Webb v. Rorke*, 2 Sch. & L. 676. But if the improvements are not necessary to preserve, though they may increase the value of the estate, the costs of them will not be allowed, as it might tend to clog the right of redemption, *Sandon v. Hooper*, 6 Beav. 246; and in all such cases where the works may amount to lasting improvements the mortgagee can scarcely be safe, without he get the consent or approval of the owners of the equity of re-

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demption, *Sandon v. Hooper*, *supra*; *Trimleston v. Hamill*, 1 B. & B. 385; *Fisher*, s. 904; *Davey v. Durant*, 1 DeG. & J. 535, 554; *Constable v. Guest*, 6 Grant 510.

Where a person agreed to purchase a leasehold supposing the seller to have an unincumbered title, and went into possession, and laid out large sums in improvements, but not having made enquiry for the title deeds was fixed with constructive notice of a prior sub-lease by way of mortgage, which he was compelled to pay off, and the seller having conveyed the reversion to a third party, the purchaser was held not entitled to a specific performance, but declared entitled to hold the estate as against that third party, not only for the sum paid to the prior mortgagee, but also for the money paid to the seller and for any sums properly laid out by him in permanent improvements in the character of a mortgagee; *V. C. Stuart* refusing to allow for all sums laid out in improvements made under the impression that he was owner, *Hipkins v. Amery*, 6 Jur. N. S. 1047, 1051.

Money paid by mortgagees in possession for taxes, for a renewal of leases, for head rent, or in supporting the mortgagor's title to the estate, or to make their title good against the mortgagor at law or in equity, or in taking out administration to the mortgagor to secure himself in case he were defeated at law, will be allowed, *Fisher* s. 900, and cases there cited.

But by *Ord.* 58, s. 7, a mortgagee who has proceeded at law shall not be entitled to his costs in equity, unless the court, under the circumstances shall see fit to order otherwise. Under this order the master has no discretion. If the decree direct the costs in equity to be taxed he must do so although it should appear for the first time in the progress of the suit, before him, that proceedings had been taken at law.

If a mortgagor seek to deprive the mortgagee of his costs in equity it would therefore seem that the facts should appear upon the pleadings and a direction to that effect made in the decree, for it is apprehended it would be too late to seek it on further directions.

In a case, however, where upon a bill being filed by a junior mortgagee for redemption and foreclosure, the elder mortgagee discontinues proceedings in a suit for foreclosure, the master would seem to be authorized to tax him his costs of his own suit and add it to his debt, *Lomax v. Hide*, 2 Vern. 185.

But money paid for insuring the mortgaged property, in the absence of any covenant for that purpose in the deed, will not be allowed. The mortgagee is entitled to the benefit of the insurance money, and not being liable to account to the mortgagor for it, he cannot charge him with the premiums, *Dobson v. Land*, 8 Hare 216; 4 DeG. & S. 575; *Russell v. Robertson*, Cham. R. 72.

A mortgagee in possession is so far a trustee that he will not be allowed to make any profit whatever out of the estate, e. g. allowances for management, or commission on consignments, *Leith v. Irvine*, 1 M. & K. 277; and if he have a power of sale he cannot, nor can a partnership of which he

may be a member, have a commission for conducting the sale professionally, *Matheson v. Clarke*, 3 Drew. 3.

In regard to trustees who have attempted to purchase the trust estate, or quasi trustees, by reason of acquiring a title defensible by reason of fraud, &c., they will be allowed sums expended in permanent and lasting improvements or such as have a tendency to bring the estate to a better sale; as in one case for a mansion house erected, plantations of shrubs, &c., *York Buildings Co. v. McKenzie*, 8 Bro. P. C. 42; *ex parte Hughes*, 6 Ves. 617; *ex parte Bennett*, 10 Ves. 895; and this proceeds, not upon the principle, that the owner lying by and allowing improvements to be made ought not to be allowed to recover the estate without paying for them; but that when a trustee expends his money, and thereby increases the value of the estate, it would be inequitable to wrest it from him, without repaying the expenditure, by which, the estate had been substantially improved; and he is therefore entitled to the improvements although the true owner be an infant and incapable of consenting to, or acquiescing in them, *Bevis v. Boulton*, 7 Grant 39; *Mill v. Hill*, 3 H. L. C. 828.

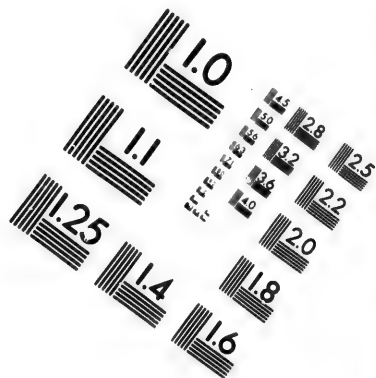
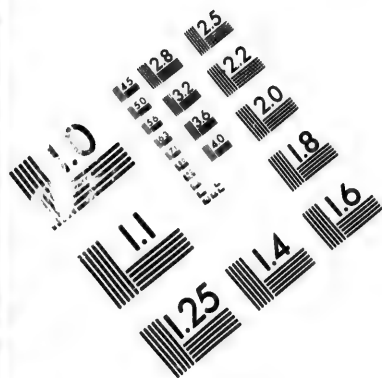
In *Nevills v. Nevills*, 6 Grant 121, 139, although the defendant had fraudulently obtained title to the property he was allowed for improvements. And in *Pascoe v. Swan*, 27 Beav. 508, the defendant denied the title of the plaintiff but was allowed for lasting improvements.

Under the general language of this section the master no doubt has power to take into account "just allowances," which in England have recently been authorised to be taken without direction in the decree, *Eng. Con. Ord.* 23, r. 16. What are just allowances must depend upon the circumstances of each case, and have in some manner been anticipated by the remarks on what mortgagees and trustees are allowed in account, although a trustee can make no benefit from the estate, yet he is entitled to be held harmless from expense and loss. When necessary the expense of a collector to receive rents, of bailiffs, surveyors, and accountants are allowed, and so are the necessary legal expenses of carrying the trust into effect, *Wilkinson v. Wilkinson*, 2 S. & S. 237; *Henderson v. McIver*, 3 Mad. 275; *Macnamara v. Jones*, 2 Dick. 587. A surviving partner continuing the business and employing the deceased's capital, may be allowed under this head for his trouble in managing it; *Cooke v. Collingridge*, Jac. 628; *Brown v. DeTastet*, *Ibid*, 299.

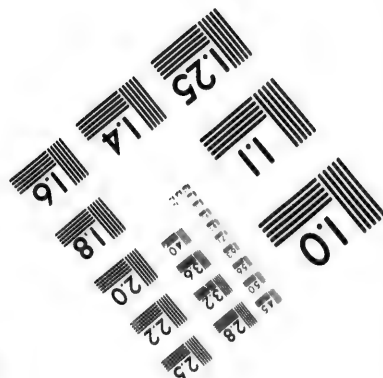
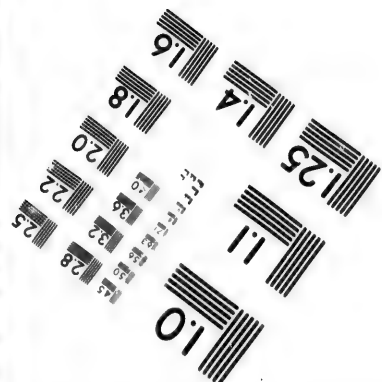
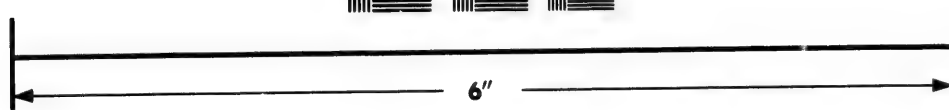
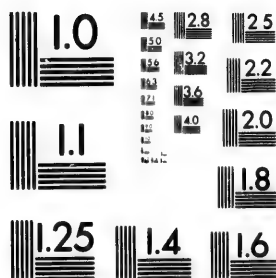
And in an account of rents of estate received by superior title these were directed, *Howell v. Howell*, 2 M. & C. 478, see *Seton*, (2nd ed.) 38.

V. FINALLY, THE MASTER IS AUTHORISED "GENERALLY IN THE TAKING OF ACCOUNTS, TO ENQUIRE AND ADJUDGE AS TO ALL MATTERS RELATING THERETO AS FULLY AS IF THE SAME HAD BEEN SPECIFICALLY REFERRED."

Down to a very recent period, a difference of opinion existed as to the construction of this clause. It was agreed that, jurisdiction being given to the master by a previous clause of the order to take accounts of rents &c., which but for wilful default might have been received, indicated an inten-



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tion to confine his powers to cases of rents &c., and not to apply them to accounts of personal profit; and that this intention was not to be controlled by the general words of the last clause. That a decree simply directing accounts to be taken, and a decree directing them to be taken with a wilful default clause, were two entirely distinct things. The first was obtained as a matter of course from an accounting party; while the latter could only be had on a bill charging specific instances of misconduct, and established by evidence. And that these general words in the last clause did not give the master the power of converting one decree into the other, *Sleight v. Lawson*, 2 K. & J. 292; *Partington v. Reynolds*, 4 Drew. 253. And so strictly was this followed that where the original decree only directed the ordinary accounts, enquiries as to wilful default would not be granted on further directions, *Cooper v. Carter*, 2 DeG. M. & G. 292. But in the case of *Carpenter v. Wood*,—not yet reported,—decided by Spragge, V.C. it has been held that these general words authorize the master, and make it his duty, to inquire as to wilful neglect or default in taking any accounts that may be referred to him. And the other judges of the court have intimated their intention of adopting that construction, which must now therefore, be considered as the law of the court.

From the large space devoted to this 13th section, it will be inconvenient to pursue it further by an investigation of the cases in which an accounting party is chargeable in that stringent manner in his dealings with personal property. The cases cited with reference to his liability as to real estate, contain the principles upon which he is charged for misconduct, or improper dealings, and a little attention will readily enable the practitioner to apply them to any case that may occur.

In concluding these remarks upon this section, it may be observed that the powers conferred on the master do not exclude the right of the court to make a decree on the subjects embraced in it at the original hearing. In several of the cases cited, e. g. *Lamont v. Lamont*, *Bevis v. Boulton*, and *Aitchison v. Coombs*, the decrees contained special directions on these subjects.

14. Under any order of reference to the master, witnesses may be examined before any examiner of the court; and upon the certificate of the master foreign commissions may issue for the examination of witnesses without the jurisdiction of the court; the master is to be at liberty to cause parties to be examined, and to produce books, papers and writings as he shall think fit, and to determine what books, papers and writings are to be produced, and when and how long they are to be left in his office; or in case he shall not deem it necessary that such

books and papers or writings should be left or deposited in his office, then he may give directions for the inspection thereof, by the parties requiring the same, at such time and in such manner as he shall deem expedient. The master is also to be at liberty to cause advertisements for creditors, and if he shall think it necessary, but not otherwise, for heirs or next of kin, or other unascertained persons, and the representatives of such as may be dead, to be published, as the circumstances of the case may require; and in such advertisements to appoint a time within which such persons are to come in and prove their claims, and within which time, unless they so come in, they are to be excluded from the benefit of the decree; and in taking any account of a deceased's personal estate under any order of reference, the master is to require and state to the court what, if any, of the deceased's personal estate is outstanding or undisposed of; and is also to compute interest on the deceased's debts from the date of the decree, and on legacies from the end of one year after the deceased's death, unless any other time of payment is directed by the will; and under any order whereby any property is ordered to be sold with the approbation of the master, the same is to be sold to the best purchaser that can be got for the same—to be allowed by the master, and either in one lot or in parcels, as the master shall direct; and all proper parties are to join therein as the master shall direct; and under every order whereby the delivery of deeds is ordered, or the execution of conveyances is directed, the master is to give directions as to the delivery of such deeds, and to settle conveyances where the parties differ, and to give directions as to the parties thereto, and the execution thereof; and for the several purposes herein enumerated no special order of the court shall be necessary.

A witness examined in the cause in chief cannot be re-examined by the same party before the master, without the leave of the court, *Smith v. Al-*

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thus, 11 Ves. 564; *Willan v. Willan*, Coop. 291; at least to the same matter to which he has been examined in chief, *Sawyer v. Bowyer*, 1 Bro. C. C. 388.

A witness examined previously to the decree, having been re-examined before the master without an order for that purpose, the depositions were suppressed with costs, *Smith v. Graham*, 2 Swanst. 264.

After decree a special order was obtained by the defendant, for the re-examination of a co-defendant who had been examined and cross-examined before the decree, and the re-examination was restrained to such of the points of the cause to which the witness had not been examined, *Purcell v. McNamara*, 17 Ves. 434, but see, *Rowley v. Adams*, 1 M. & K. 543.

Witness called by the plaintiff and cross examined by the defendant before the hearing on a point not then in issue in the cause, was allowed to be examined again by the defendant on the same issue, when raised before the master under the decree, *Whitaker v. Wright*, 2 Hare 321.

A witness examined at the hearing, only to prove exhibits, may be examined before the master to prove other exhibits without a special order, *Cowdrey v. Hoskins*, 2 Russ. 253.

The master is bound equally with the court to allow a witness to be cross-examined on the whole case without regard to his examination in chief; but in some cases he may exercise his discretion as to who should pay the fees of the examination, *Crandell v. Moon*, 6 U. C. L. J. 143.

Where a party upon whom the onus of proof lies, produces a receipt, or other proof of a conclusive nature, and closes his evidence; and the other side produces testimony tending to shake this evidence, further evidence in support will be allowed to be produced, though in strictness it may be such as might have been produced in the first instance, *Moody v. McCann*, Cham. R. 88.

As to production of documents, see notes to *Order 20*, s. 1.

A defendant can, after decree, compel production by a co-defendant, *Hart v. Montefiore*, 10 W. R. 97; 30 Beav. 280.

It is in the discretion of the master to determine whether books, deeds &c., are merely to be produced from time to time, or to be deposited with him, *Henna v. Dunn*, 6 Madd. 340; *Sidden v. Liddiard*, 1 Sim. 388.

As to the proceedings upon orders for sales, see *Ord. 36*.

15. Where, in proceedings before the master, it appears to him that some persons not already parties ought to be made parties, and ought to attend, or be enabled to attend the proceedings before him, he may direct an office copy of the same to be served upon such parties; and upon due service thereof such parties are to be treated and named as parties to the suit, and to be bound by the

decree in the same manner as if they had been originally made parties to the suit.

Every office copy of a decree directed to be served under this section, is to be endorsed with a notice to the effect set forth in schedule N. to these orders, with such variations as circumstances may require.

The notice referred to in this section will be found in the appendix of forms.

16. So soon as the hearing of any matter pending before the master shall have been completed, he shall so inform the parties to the reference then in attendance, and shall make a note to that effect in the master's book ; and after such entry no further evidence shall be received, or proceedings had, without the special permission of the master ; but the master may proceed to prepare his report or certificate without further warrant, except the warrant to settle, which shall be served on the parties as the master shall direct. So soon as the master's report or certificate shall have been prepared, it shall be delivered out to the party prosecuting the reference, or in case he shall decline to take the same, then, in the discretion of the master, to any other party applying therefor ; and a common attendance shall be allowed to the party taking the same.

Reports become absolute, without order confirming the same, at the expiration of fourteen days after the filing thereof, unless previously appealed from, *Ord. 79 s. 1.*

Any party affected by the report may file the same, or a duplicate thereof, and the filing of such duplicate, has the same effect as the filing of the report, for the purpose of procuring the confirmation thereof at the expiry of the fourteen days, *Ibid, s. 2.*

#### XLIII.—REGISTRAR'S OFFICE—SOLICITOR AND AGENT'S BOOK—OFFICE COPIES.

1. The registrar is to keep in his office a book to be called "The Solicitor and Agent's Book," in which each solicitor residing elsewhere than in the city of Toronto, is to specify the name of an agent being a solicitor

of this court, and having an office in the city of Toronto, upon whom pleadings, writs, notices, orders, appointments, warrants, and other documents and written communications may be served. Where the pleadings in any cause have been filed in the office of the registrar, then all pleadings, writs, notices, orders, appointments, warrants, and other documents and written communications in relation to such suit, which do not require personal service upon the party to be affected thereby, are to be served upon the solicitor, when residing in the city of Toronto, or, where the solicitor resides elsewhere than in the city of Toronto, then upon his agent named in "The Solicitor and Agent's Book," as provided above; and where the pleadings have been filed elsewhere than in the office of the registrar, then all notices, appointments, warrants and other documents and written communications in relation to matters transacted in court, or chambers, or in the office of the master or registrar, are to be served in like manner; and if any solicitor neglect to cause such entry to be made in "The Solicitor and Agent's Book," the leaving a copy of any such pleading, writ, notice, order, appointment, warrant, or other document or written communication, for the solicitor so neglecting as aforesaid, in the office of the registrar, is to be deemed sufficient service, unless the court direct otherwise.

For various alterations in this section, see *Ord. 76*.

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2. Upon every writ sued out, and upon every information, bill, demurrer, answer or other pleading or proceeding, there shall be endorsed the name or firm and place of business of the solicitor and solicitors by whom such writ has been sued out, or such pleading or other proceeding has been filed; and when such solicitors are agents only, then there shall be further endorsed thereon, the name or firm, and place of business of the principal solicitor or agent.

Service of subpoena to appear and answer without endorsement may be set aside on speedy application, *Johnson v. Barnes*, 1 DeG. & S. 129; omission of the address for service does not necessarily make the writ void, but the court will stay process till the rule is complied with, *Price v. Webb*, 2 Hare 511. An attachment was discharged with costs, endorsement of subpoena on which it issued being defective, *Barnes v. Tweddell*, Coop. 440.

Until a solicitor of a party be changed by order of the court, notices served upon him, though he has ceased to act for the party, are regular, *Wright v. King*, 9 Beav. 161; *Davidson v. Leslie*, 9 Beav. 104.

Where a solicitor to a party dies, no order is required for appointment of a new solicitor, *Whalley v. Whalley*, 22 L. Jns. Ch. 682.

Formerly, if on the death of the clerk in court of a party, he refused to appoint another solicitor, such party must have been served with a subpoena to name a clerk in court, *Ratcliff v. Roper*, 1 P. Wms. 420; *Francklyn v. Colhoun*, 12 Ves. 2; *Gibson v. Ingo*, 12 Jur. 105. It is presumed the same practice must still be followed if the party refuses or neglects to appoint another solicitor.

3. Every party suing or defending in person is to cause to be endorsed or written upon every writ which he sues out, and upon every information, bill, demurrer, answer, or other pleading or proceeding, his name and place of residence, and also (when his place of residence is more than three miles from the office where such pleading or other proceeding is filed) another proper place, to be called his address for service, not more than three miles from the said office, where writs, notices, orders, warrants, and other documents, proceedings and written communications may be left for him. (*Eng. Con. Ord. 3, r. 5.*)

See notes on preceding section.

4. In future office copies of pleadings and affidavits are to be made by the solicitor, and examined and certified by the registrar. Any party requiring an office copy of any pleading or affidavit is to make a written application for the same to the solicitor of the party by whom it has been filed or on whose behalf it is to be used; and when such party has no solicitor, then to the party himself. When an application is made for an office

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copy of any pleading or affidavit, it is to be delivered within forty-eight hours from the time of such demand; and any further time which may elapse before the delivery thereof is not to be computed against the party demanding the same. Office copies of pleadings and affidavits are to be written on paper of convenient size, in a neat and legible manner, and unless so written the solicitors furnishing them are not to be paid for the same.

See *Ord.* 40. s. 4.

Pleadings and depositions are usually read from office copies, which, for this purpose, must be duly signed by the proper officer, *Gee v. Gurney*, 8 Beav. 315. Neither drafts nor office copies of pleadings are considered by the court, as evidence in themselves, and if a doubt is suggested as to their accuracy, the court will refer to the original record; the practice of referring to drafts or office copies, appears to have been adopted merely to save the court the trouble of inspecting the originals, which are, nevertheless, always understood to be in court, *Daniel's Ch. Pr.* 761.

Taking an office copy of an answer for want of which defendant is in contempt is a waiver of the contempt, *Herritt v. Reynolds*, 6 Jur. N. S. 880; 8 W. R. 405.

By demanding and accepting office copies of affidavits referred to in any notice of motion, the party demanding them, is precluded from taking the objection that they were not filed at the time of serving the notice.

5. All documents of whatever nature required to be transmitted to the registrar of the court, or any of the deputy registrars, may be so transmitted through the post office, under cover, directed to the registrar or deputy registrar, as the case may be, sealed with the seal of the party required to transmit the same; or they may be forwarded by a special messenger: in that event the messenger is to make oath, before the registrar, or deputy registrar, that he received the document from the hands of the party required to transmit the same,—that it has not been out of his possession since he so received it,—and that it is in the same state and condition as when it was placed in his hands for transmission; and the name, style and place of residence of such messenger are forthwith

to be endorsed upon the document so transmitted by the registrar or deputy registrar, as the case may be.

When the examination of witnesses before a judge is to be had in any town or place, other than that in which the pleadings in the cause are filed, it shall be the duty of the party setting down the cause for such examination, to deliver to the registrar or deputy registrar, with whom the pleadings are filed, a sufficient time before the day fixed for the examination, a precept requiring him to transmit to the registrar or deputy registrar, where such examination of witnesses is to be had, the pleadings in the cause; and at the same time to deposit with him a sufficient sum to cover the expense of transmitting and re-transmitting such pleadings, and therefore, it shall be the duty of such registrar or deputy registrar forthwith to transmit the pleadings accordingly, *Ord.* 97 s. 2.

6. Bonds executed upon an order for security for costs are to be given to the registrar, or deputy registrar, with whom the pleadings in the suit are filed; all the defendants are included in the same bond; and the penal sum to be inserted therein is to be fixed upon the application for security by the judge or master who makes the order.

As to the cases in which security for costs will be ordered, see notes to order 5, s. 5. The penal sum inserted in the bond is usually £100.

For form of bond, see appendix of forms.

7. The amount to be deposited with the registrar of the court on any petition of re-hearing is ten pounds.

As to costs on dismissal of petition of re-hearing, see notes to order 9, s. 17.

8. Money ordered to be paid into court is to be paid into the Commercial Bank, with the privity of the registrar; the solicitor, or party paying the same, is to furnish the bank with a correct copy of so much of the order of court as relates to such payment, with the names of the parties to the suit, and the date of the order. All sums of money to be paid out of the court are to be so paid upon the check of the registrar, countersigned by one of the judges of the court, and not otherwise.

See Chancery Act, s. 72, and notes.

9. All orders of course are to be drawn up by the registrar upon precept.

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All orders in the progress of a cause which are drawn up by the registrar without the special direction of the court may be drawn up by the deputy registrar with whom the bill is filed, *Ord. 44 s. 5*.

Decrees for redemption, or foreclosure of mortgage or for sale are now drawn up upon precipe, *Ord. 98*; but such decrees cannot be issued by deputy registrars.

The court will not set aside a decree regularly obtained upon precipe, except upon an affidavit shewing that the defendant will be damaged by the decree being permitted to stand against him, *Mitchell v. Crooke*, 2 Grant 123.

10. The evidence read upon the hearing of any cause, or matter is not to be stated in the decree or order, but must be entered in the registrar's book at the time of the hearing.

The evidence read by each side must be stated distinctly by counsel, in order that the same may be entered by the registrar before the case is closed, and a schedule of all the exhibits used upon the hearing must be deposited with the registrar *Ord. 68*.

Where plaintiff reads part of a defendant's answer, the whole is to be entered as read; a defendant not called on for his defence may enter all his evidence as read; proceedings in former suits respecting the same matters may be entered as read, *Manby v. Bewicke*, 3 Jur. N. S. 685.

Where the reception of evidence has been objected to at the hearing, the manner of entering should be such as to shew what evidence has been received, *Watson v. Parker*, 2 Phill. 5; *Parker v. Morrell*, *Ibid*, 453. Evidence not to be entered as read *de bene esse*, *Drake v. Drake*, 25 Beav. 641.

Evidence entered as read saving just exceptions, *Gee v. Gurney*, 8 Beav. 815; but entry in that way stated by registrar to be irregular, *Sherwood v. Beveridge*, 2 Coll. 536; and see *Handford v. Handford*, 4 Russ. 212.

Evidence which does not appear by the registrar's minutes to have been read ought not to be ordered subsequently to be entered, *Eden v. Earl of Bute*, 1 Bro. P. C. 465.

11. Where accounts are directed to be taken, or enquiries to be made, by any decree or order, each direction is to be numbered, so that, as far as may be, each distinct account and enquiry may be designated by a number, and such order may be in the form set forth in schedule Q., appended hereto, with such variations as the circumstances of the case may require, (*Eng. Con. Ord. 23, r. 15.*)

See as to the mode of taking accounts in chambers, *Ord.* 35; and before the master, *Ord.* 42, ss. 2, 6; as to the accounts and enquiries which may be taken and made by the master without special directions, *Ibid.* s. 13.

The form of decree mentioned in this section is given in the appendix of forms.

12. Interlocutory orders are not to be enrolled. Decrees or decretal orders are not to be enrolled until the final order or decree in the cause has been pronounced. When the final decree or order is entered in the registrar's book he is to state in the margin of the book the date at which such entry was made; and after the expiration of thirty days from the date of such entry, if no petition for re-hearing has been in the meantime filed, the registrar, at the instance of any party to the cause, is to attach together the bill, pleadings, and other proceedings in the cause, and is to annex thereto a fair copy of the decree or decretal order signed by the chancellor, and countersigned by the registrar, and the papers and proceedings so annexed and signed are to remain of record in his office, and such filing is to be deemed and taken to be an enrolment of the decree for all purposes.

It is not necessary to petition to enrol decrees after any lapse of time, *Anon.*, 1 Grant 168.

As a general rule a decree is absolute in the first instance, but to this there are some exceptions; as to the mode of making absolute certain decrees which are not so in the first instance, see *Ord.* 14 ss. 5, 6.

An infant defendant is entitled to six months after he comes of age to shew cause against a decree, *Walsh v. Trevanion*, 12 Jur. 547; and he is entitled to this in a foreclosure suit, *Newbury v. Marten*, 15 Jur. 166; *Mair v. Kerr*, 2 Grant 223; but not where the decree is for sale.

The clause giving the infant a day to shew cause must be inserted in the decree, and in a foreclosure suit it must be inserted in the decree as well as in the final order of foreclosure.

Where the parties agree upon the terms of the decree, it may be taken by consent, and in such cases it is usual, previously to going into court, to prepare minutes of the decree, which being agreed upon by the opposite parties, counsel appear upon the hearing and consent, and the decree is drawn up as of course.

A party is bound by the consent of counsel, if apprised of those facts of which the knowledge was essential to the proper exercise of their discretion; but where the consent is given in ignorance of material circumstances,

the party will be relieved upon terms, *Furnival v. Bogle*, 4 Russ. 142. If the party did not in fact consent, his remedy is against the counsel, *Bradish v. Gee*, Amb. 229. A decree by consent of counsel cannot be set aside either by rehearing or appeal, *Ibid*; nor by proceeding in the nature of a bill of review, *Webb v. Webb*, 8 Swanst. 658. If a party has been induced by fraud to consent, or has by mistake consented to a decree, the court has power to relieve him, *Davenport v. Stafford*, 8 Beav. 503. The court has refused to decree specific performance of an agreement for the compromise of an action, to which the counsel had consented, without the authority of his client, *Swinfen v. Swinfen*, 3 Jur. N. S. 1109.

Where judgment has been given, the plaintiffs solicitor should leave the brief with the registrar in order that he may prepare the minutes. In practice the minutes are frequently drawn by the party in whose favor judgment has been given, but this is irregular, and all minutes should be prepared by the registrar. The minutes having been prepared, the party having the carriage of the decree serves notice on the other parties to the suit, appointing the day and hour for attending before the registrar to settle them.

If the parties do not attend it is usual to serve a second notice, but an order drawn up in the defendant's absence will not be set aside unless error be shown, *Smith v. Acton*, 26 Beav. 559; but if the minutes have been settled by the registrar, they cannot be altered in the absence of any of the parties interested, *Major v. Major*, 13 Jur. 1.

When upon a perusal of the minutes, it appears that anything is doubtfully expressed, or contrary to the meaning of the court or that something has been omitted which should have been inserted, and the registrar refuses to alter them, an application must be made to the court to vary the minutes.

This is done by notice of motion served upon all parties, and the alteration desired should be expressed in the notice. There is no time limited within which the motion must be made, but the application will be entertained at any time while the decree remains in minutes. Questions of importance should not be raised on motions to vary minutes, but this rule is not strictly adhered to, and discussions of great moment have been permitted, *Perry v. Phelps*, 1 Ves. 250.

The minutes having been settled, the decree is engrossed and notice is served appointing a time to pass it. A notice to settle or pass given the one day for the next, is sufficient notice, *Re Christmas*, 19 Beav. 519. The parties having attended upon the notice to pass, and passed the decree, it is next entered in the decree book in the registrar's office, and the date of such entry is written in the margin of the book. All proceedings under a decree or order before it is entered, are voidable and irregular, *Tolson v. Jervis*, 8 Beav. 384; *Drummond v. Anderson*, 3 Grant 150. A decree founded on a bill taken *pro confesso*, must be passed and entered as other decrees, *Ord.* 14, s. 4.

As long as the decree remains in minutes it may be varied upon a

motion to vary the minutes, but after it is passed and entered the court will not entertain any application to alter it, unless as to matters which are quite of course. The proper mode of rectifying it in other matters is by rehearing the cause. But where a clerical error has crept into the decree, or where some ordinary direction has been omitted, the court will allow an application being made to correct it. This application is made on petition, *Moffatt v. Hyde*, 6 U. C. L. J. 94. A decree was not allowed to be varied by giving costs to a defendant who would have been entitled to them if asked at the hearing, *Colman v. Sarell*, 2 Cox 206; and Sir John Leach declined to correct a decree in which the error was apparent, because the alteration proposed would have required new directions upon the corrected part, *Brookfield v. Bradley*, 2 S. & S. 64; but where the decree in a creditors' suit, omitted the usual direction to take an account of the personal estate, it was ordered to be inserted, *Pickard v. Matheson*, 7 Ves. 292.

It is a well established principle, that every order and decree, however erroneous, is good until it is discharged, *Chuck v. Cramer*, 2 Ph. 115.

Office copies of decree to be served on parties added in the master's office, may be certified by the deputy registrar where the reference is made to, *Ord. 66*.

Every decree affecting land may be registered in the registry office of the county where the land is situate, on a certificate by the registrar or a deputy registrar of the court, setting forth the substance and effect of the decree, and the land affected thereby, see *Chancery Act, s. 55*.

The court may under special circumstances vacate the enrolment of a decree, *Woods v. Woods*, 12 Jur. 682; as where the conduct of the party obtaining the enrolment was such as to lead the other party to suppose that the decree would not be enrolled, *Wickenden v. Rayson*, 3 W. R. 462. But not unless the party has been guilty of *mala fides*, or has misled his opponent, *Backhouse v. Wylde*, 3 Jur. N. S. 398; *Williams v. Page*, 5 W. R. 854.

Decrees and orders of the court may be enforced by attachment and sequestration, unless they are for the payment of money when they can be enforced by writ of *fieri facias*, and not by attachment.

Where a defendant who was to be served with a decree refused to receive the copy, upon which it was left at his dwelling house with his servant, it was held sufficient, *Pycroft v. Williams*, 5 W. R. 464. In a proper case substituted service of a decree will be permitted, *Burlton v. Carpenter*, 11 Beav. 33; *Re Mourilyan*, 13 Beav. 84; and the order for such purpose may be obtained on an *ex parte* application, supported by affidavit, *Danford v. Cameron*, 8 Hare 329.

#### XLIV.—DEPUTY MASTERS AND DEPUTY REGISTRARS.

1. Deputy masters and deputy registrars respectively are to perform the duties of their several offices in the



same manner, and under the same regulations as the like duties are performed by the master and registrar respectively; and all orders, rules and regulations, in force respecting the master and registrar respectively, and respecting the regulations of their respective offices, are to be in force and applicable to the deputy masters and deputy registrars respectively, in relation to such duties as they are hereby required to perform; and the like sums and fees payable to the master and registrar respectively, are to be payable to the deputy masters and registrars respectively in relation to similar matters.

Deputy registrars and deputy masters are appointed by the judges, who may at their discretion remove them, *Con. Stat. U. C.*, c. 12, s. 13; they may retain for their own use all the fees of office, not belonging to any fee fund, *Ibid.*, s. 15.

2. A bill of complaint may be filed either with the registrar, or with a deputy registrar, at the option of the plaintiff; but all the pleadings in any cause must be filed at the same office; and where a bill is filed in the office of a deputy registrar the endorsement thereon must be varied accordingly.

See notes on Chancery Act, s. 13; *Order* 9 s. 2, and notes.

As to returns by deputy registrars, see *Ord.* 66 s. 2.

Deputy registrars may issue certificates for registration, *Con. Stat. U. C.*, c. 12, ss. 64, 65.

3. When a bill is filed with a deputy registrar, the deputy master and deputy registrar respectively in the county where such bill has been filed, are to have all such powers and authorities in relation to such suit as belong to the master and registrar respectively.

The plaintiff has, *prima facie*, a right to have the reference directed to the master resident in the county where the bill is filed, *Macara v. Gwynne*, 3 Grant 310.

4. In addition to the powers and authorities conferred upon him by the previous section, the deputy master in the county where the bill has been filed is to hear and dispose of all applications in the progress of such suit, for



the following purposes, viz: (1.) To appoint guardians *ad litem* for infants. (2.) For time to answer or demur. (3.) For leave to amend before replication. (4.) To postpone the examination of witnesses, or to allow further time for the production of evidence. (5.) For security for costs.

For the mode of proceeding to appoint a guardian *ad litem*, see *Ord. 13, s. 5*; and as to amendment of bills, see *Ord. 9, ss. 9, 10, 11, 12, 13*.

As to security for costs, see *Ord. 5, s. 5*, and notes.

5. All orders in the progress of a cause which are drawn up by the registrar without the special direction of the court may be drawn up by the deputy registrar with whom the bill is filed.

6. Each deputy registrar is to keep in his office a book to be called "The Solicitor and Agent's Book," in which each solicitor residing elsewhere than in the county in which such deputy registrar's office may be, is to specify the name of an agent, being a solicitor of this court, and having an office in the city or town where the office of such deputy registrar is situated, upon whom all writs, pleadings, notices, orders, warrants, and other documents, and written communications in relation to proceedings conducted in the office of the deputy master or deputy registrar of such county, may be served.

All writs, pleadings, notices, orders, warrants, and other documents, and written communications in this section specified, which do not require personal service upon the party to be effected thereby, may be served upon his solicitor residing in the county where such proceedings are conducted, or, where such solicitor does not reside in the county where such proceedings are conducted, then upon the agent named in "The Solicitor and Agent's Book," as herein provided. And if any such solicitor neglect to cause such entry to be made in "The Solicitor and Agent's Book," the leaving a copy of any such writ, pleading, notice, order, warrant, or other document, or

written communication for the solicitor so neglecting as aforesaid in the office of such deputy registrar, is to be deemed sufficient service.

For slight alterations, see *Ord. 76*.

### XLV.—Costs.

1. Upon interlocutory applications, where the court deems it proper to award costs to either party, it may by the order direct payment of a sum in gross in lieu of taxed costs, and direct by and to whom such sum in gross is to be paid. And the same may likewise be done upon such proceedings before the court or in chambers as have heretofore been matters of reference to the master.

And it shall also be competent for the deputy master, upon disposing of applications made to him under Order XLIV., in like manner to direct payment of a sum in gross in lieu of taxed costs, and to direct by and to whom such sum in gross is to be paid.

The giving of costs in equity is discretionary, *Bennett College v. Carey*, 3 Bro. C. C. 390; but in contentious cases the costs of the litigation should, as a general rule, follow the result, *Bartlett v. Wood*, 9 W. R. 817; and see *Colburn v. Simms*, 2 Hare 543; *Millington v. Fox*, 3 M. & C. 338.

As to the general rules applicable to costs of interlocutory proceedings when no special directions are given, *Daniel's Ch. Pr.* 1029; and see 1 S. & S. 357. If the object of the motion be in the nature of an indulgence to the party applying, he pays the costs, though the motion is granted, *Browne v. Lockhart*, 10 Sim. 420.

Costs of an abandoned motion are not costs in the cause, *Lewis v. Armstrong*, 3 M. & K. 69.

2. If upon the taxation of costs it should appear to the master that any proceedings have been taken unnecessarily, and which were not calculated to advance the interests of the party on whose behalf the same were taken, it shall be the duty of the master to disallow the costs of such proceedings, as well on the taxation of costs between solicitor and client, and as between solicitor and client, as on a taxation between party and party, unless the master shall be of opinion that such proceedings were

taken by the solicitor because they were in his judgement conducive to the interest of his client. It shall not be the duty of the master, on a taxation of costs between a solicitor and his client, to disallow to the solicitor his costs of such proceedings where it is made to appear that such proceedings were taken by the desire of the client, after being informed by his solicitor that the same were unnecessary and not calculated to advance the interests of the client; but the costs of such proceedings are not to be allowed in any case where, according to the present practice and rules of taxation, the same would not be allowed.

3. Where costs are to be taxed as between party and party, the master may allow to the party entitled to receive such costs the like costs as are taxable where costs are directed to be taxed as between solicitor and client in—Advising with counsel on the pleadings, evidence, and other proceedings in the cause. Procuring counsel to settle and sign such pleadings and petitions as may appear to have been proper to be settled by counsel. Procuring and attending consultations of counsel. The amendment of bills. On proceedings in the master's office. Supplying counsel with copies or extracts from necessary documents. But in allowing such costs, the master is not to allow such party any costs which do not appear to have been necessary or proper for the attainment of justice, or for the defending his rights; or which appear to have been incurred through the over-caution, negligence or mistake, or merely at the desire of the party. The following fees and disbursements may be charged and allowed in respect of the services hereinafter enumerated.

## SOLICITOR.

Instructions for suit.....	£0 10 0
Instructions to defend.....	0 10 0
Instructions for petition where no bill filed.....	0 10 0
Letter of notice before instituting suit.....	0 2 6

Drafting bill not exceeding 20 folios, including copy to keep 1 0 0  
 For every additional folio above 20, (to be allowed in the  
 discretion of the master) including copy to keep, per  
 folio..... 0 1 0

[No greater sum than 30s. to be taxed by the master for drawing  
 any bill, without the special direction of one of the judges of the  
 court upon the application of the solicitor requiring the same, for  
 which application no charge is to be made.]

Drafting answer or other pleading, petition or special affi-  
 davit, per folio..... 0 1 0

[No greater sum than 30s. to be taxed for drawing any answer,  
 petition, or affidavit, without the special direction of one of the  
 judges of the court, as provided for in the case of bills; and no  
 greater sum is to be allowed for drawing any answer, petition or  
 affidavit, than would have been taxed irrespective of this order.]

Engrossed copies to file, copies to serve (other than copies  
 on which a fee is paid to the master or registrar, for  
 reading over or authenticating the same) each per folio 0 0 6

Copies of orders or other papers or documents, not office  
 copies, required to be served, per folio..... 0 0 6

Office copies to be authenticated by the registrar, and en-  
 grossment of affidavit read over by the master to the  
 deponent, per folio..... 0 0 5

Affidavits of service, including attendance to swear..... 0 2 0

Precipe for any process including attendance..... 0 1 3

Special attendance on the master's warrant or appointment,  
 or on examination of witnesses, or on hearing of cause  
 or demurrer or special motion..... 0 5 0

When the hearing shall exceed one hour, then for every ad-  
 ditional hour which shall be occupied by such hearing,  
 and at which the solicitor shall be present in court, pro-  
 vided the same be noted in the registrar's book, or be  
 proved by affidavit (such affidavit to be without charge,) the  
 same not to exceed 20s..... 0 5 0

For every additional hour beyond one hour in the master's  
 office..... 0 5 0

For every additional hour in the examination of witnesses  
 where no counsel employed..... 0 5 0

Attending consultations of counsel, per hour..... 0 5 0

[No special attendance to be allowed to a solicitor on proceedings  
 upon which he appears also as counsel.]

Appointment to settle minutes, or to pass decree or order,  
copy and service..... 0 3 0

For every hour's attendance before the registrar by his ap-  
pointment, on settling minutes, the same being noted  
by the registrar..... 0 5 0

For every hour's attendance before the registrar by his ap-  
pointment, on passing decree or special order, the same  
being noted by the registrar..... 0 5 0

Where minutes settled, or decree or special order approved  
of or passed between the solicitors after appointment  
issued by the registrar..... 0 5 0

[In such case no fee to be allowed to either party as for attend-  
ance before the registrar in respect of the same settling or passing.]

Fee on all writs and orders of court to the party obtaining  
the same..... 0 5 0

Instructions for brief..... 0 5 0

Brief, per folio, including briefing and fair copy, subject to  
be reduced by the master, if the same contain superflu-  
ous matter, or be of unnecessary length.. .. 0 0 6

Observations, or other original matter in brief, per folio,... 0 1 0

[No fee or brief for second counsel to be allowed unless by order  
of a judge ; and a brief of depositions or special affidavits to be al-  
lowed only where fee and brief for second counsel is taxed, and then  
only by the direction of a judge upon special application.]

Advertisement for sale of real and personal estate, under  
the direction of the court, including all copies, except  
for printing..... 0 5 0

Copies for printing—per folio..... 0 0 6

Fee on conducting sale—including arrangements with auc-  
tioneer, correcting proof-sheet, (if any,) and attending  
sale..... 1 5 0

For every hour beyond three occupied at such sale..... 0 5 0

Drawing bills of costs and attending taxation..... 0 5 0

Drawing judge's appointment, and attending for his signa-  
ture, and to serve..... 0 5 0

Every necessary attendance..... 0 1 3

Postages—the amount actually disbursed.

[The sum allowed for copying and briefing shall be six-pence per  
folio, except where authenticated by the registrar, or read over by  
the master ; provided that the same shall not in any case exceed one

half of the amount which shall be allowed for drawing what shall be so copied or briefed.]

## COUNSEL

On argument at judge's chambers in cases proper for the attendance of counsel, to be increased at the discretion of the judge.....	£0 10 0
On settling and signing pleadings and petitions respectively, where from their special nature the master shall think the pleading or petition a proper one to be settled by counsel.....	0 10 0
On consultations .....	1 5 0
On special application to the court, arguing demurrer or other special argument, or at the hearing of a cause...	1 5 0
To be increased, in the discretion of the master, to.....	5 0 0

[Any fee exceeding £5, to be allowed only by order of a judge, to be obtained at the cost of the solicitor making the application.]

## MASTERS IN ORDINARY AND DEPUTY MASTERS ; CLERKS AND MASTERS EXTRAORDINARY.

Every summons or warrant.....	£0 1 3
Administering oath, or taking affirmation.....	0 1 0
Marking every exhibit.....	0 1 0
Drawing depositions, reports or orders, per folio.....	0 1 0
One fair copy when necessary, per folio.....	0 0 6
Copy of papers given out when required, per folio.....	0 0 6
Every attendance upon a reference. ....	0 5 0
For each additional hour.....	0 5 0
Every certificate.....	0 2 6
Filing each paper.....	0 0 4
Taxing costs, including attendance.....	0 5 0
Making up and forwarding answers and depositions.....	0 1 3
Every special attendance out of office, within two miles.....	0 5 0
Every additional mile above two.....	0 1 0
Reading affidavit—per folio.....	0 0 1
Matter added—per folio.....	0 1 0

## REGISTRAR.

Entering parties names and filing bill, answer or demurrer.....	£0 2 6
Entering and filing all other pleadings, interrogatories and depositions, or other evidence.....	0 1 0
Filing and registering affidavits, exhibits, or other papers	0 0 4



Subpoena, including filing precipe.....	0 2 6
Special writ, writ of commission.....	0 5 0
Office copy of papers required to be given out—per folio...	0 0 6
Examining and authenticating same, when office copy prepared by solicitor—per folio.....	0 0 1
Attendance on appointment of guardian.....	0 2 0
Amendment of record when re-engrossment not necessary—per folio.....	0 1 0
Drawing fiat on petition.....	0 1 0
Attending a judge for his signature to any document or paper .....	0 1 3
Making up, and forwarding interrogatories.....	0 1 3
Setting down cause.....	0 2 6
Certificate of pleadings being filed.....	0 2 0
Certificate of state of cause.....	0 2 6
Drawing minutes of decree or special order, per folio.....	0 1 0
Drawing decree or order, per folio.....	0 1 0
Entering same, per folio.....	0 0 6
Fee on payment of money into court.....	0 1 3
Fee on payment of money out of court.....	0 1 3
Fee on admission of solicitor.....	0 5 0
Certificate on each office copy of the time of filing bill .....	0 1 3
Searching files in office.....	0 1 0
Commission appointing deputy master or registrar or master extraordinary.....	0 10 0

## XLVI.—PROCESS.

1.—No writ of execution shall be issued for the purpose of requiring or compelling obedience to any order or decree of the court; but the party required by such order or decree to do any act, shall, upon being duly served with such order or decree, be held bound to do such act in obedience to such order or decree.

The original order or decree should at the time of service be produced and shewn to the person served; and if it be intended to enforce obedience by process of contempt, in the event of non-compliance with the decree or order, the copy served should have the endorsement required by sec. 6.

Any party directed by the master to bring in any account, or do any other act, is to be held bound to do the same in pursuance of the direction of the master in that behalf, without any warrant or written direction being served on him for that purpose, *Ord. 42, s. 2.*



2. If any party who is by any order or decree ordered to pay money, or to do any other act in a limited time, shall, after due service of such order or decree, refuse or neglect to obey the same according to the exigency thereof, the party prosecuting such order or decree shall, at the expiration of the time limited for the performance thereof, upon filing with the registrar an affidavit of the service of such order or decree, and of the non-performance thereof, be entitled without further order to a writ or writs of attachment against the disobedient party; and in case such party shall be taken or detained in custody under any such writ of attachment without obeying the same order or decree, then upon the sheriff's return that the party has been so taken or detained, the party prosecuting such order or decree shall be entitled without further order to a commission of sequestration against the estate and effects of the disobedient party.

No writ of attachment can now issue for non-payment of money, but in place of the attachment, a writ of *f. fa.* is substituted.

Commissions of sequestration when issued are directed to the sheriff, s. 4.

A warrant to the sheriff to commit a party is not irregular, though no return day is mentioned in it, *Prentiss v. Brennan*, 1 Grant 497.

On a motion to commit for breach of an injunction, it is not necessary for the affidavit to state that the writ was under the seal of the Court, *Farwell v. Wallbridge*, 3 Grant 628.

A married woman, defendant, living with her husband, was ordered to bring certain accounts, as administratrix, into the master's office, and having disobeyed the order, an application to commit her for contempt was refused, the general rule being that the husband must answer for the wife's default, unless he shews some ground of exemption, *Maughan v. Wilkes*, Cham. R. 91.

3. If an attachment cannot be executed against such party so refusing or neglecting to obey such order or decree, by reason of his being out of the jurisdiction of the court, or of his having absconded, or that with due diligence he cannot be found, and the court be satisfied by affidavit that such is the case, the party prosecuting such order or decree shall be entitled to an order for a

commission of sequestration against the estate and effects of the disobedient party; and it shall not be necessary for this purpose to sue out an attachment in the first instance.

Upon the Sheriff's return of *non est* to a warrant for the committal of a party, a sequestration will issue at once, *Prentiss v. Brennan*, 1 Grant 497.

4. Commissions of sequestration are to be directed to the sheriff, unless some good reason exists for the contrary.

For the fees to which the sheriff is entitled on commissions of sequestration, see *Ord.* 65.

5. Attachments with proclamations and commissions of rebellion are hereby abolished; and it shall not be necessary, in order to enforce any order or decree, to obtain any order for, or sue out a warrant to, the sergeant-at-arms.

6. Every order or decree requiring any party to do any act thereby ordered shall state the time after service of the decree or order within which the act is to be done; and upon the copy of the order or decree which shall be served upon the party required to obey the same, there shall be endorsed a memorandum in the words, or to the effect following, namely, "If you, the within named, (*here insert the name of the party*), neglect to obey this order or decree by the time therein limited, you will be liable to be arrested by the sheriff; and you will also be liable to have your estate sequestered for the purpose of compelling you to obey the same order or decree without further notice."

7. Subpœnas for costs are hereby abolished; a decree or order directing the payment of costs is in future to fix a time for such payment; and such decree or order shall be enforced in the same manner as any other decree or order directing the payment of money; for this purpose it shall be necessary to serve only a copy of so much of the decree or order as directs the payment of such costs,

and the time to be fixed is to be a certain time after such service.

Under the practice which has been introduced since the 22nd Vic. ch. 85 came into force, it is not necessary to serve the order. On filing the master's certificate of taxation a writ of *fi. fa.* is obtained at once.

8. It shall not be necessary to issue any writ of attachment or injunction upon any decree or order for delivery of possession, but the party prosecuting such decree or order, upon filing with the registrar an affidavit of service of the same, and of non-compliance therewith, shall be entitled without further order to a writ of assistance.

As to order for delivery of possession in mortgage suits, see *Ord. 32, s. 1*; *Ord 69*.

9. No order for the production of deeds, papers, writings or documents, made under the 20th Order of this court, shall require personal service; if the party required to obey the same shall have a solicitor, it shall be sufficient to serve the same upon such solicitor; but any writ or writs of attachment to be issued for disobedience to any such order, must be obtained according to the present practice by orders *nisi* and absolute, and such orders *nisi* must be personally served.

10. Every person, not being a party in any cause, who has obtained any order, or in whose favour an order has been made, shall be entitled to enforce obedience to such order by the same process as if he were a party to the cause; and every person not being a party to any cause, against whom obedience to any order of the court may be enforced, shall be liable to the same process for enforcing obedience to such order as if he were a party to the cause.

#### XLVII.—POWERS OF COURT OR JUDGE.

The power of the court and of the judge sitting in chambers to enlarge or a bridge the time for doing any act, or taking any proceeding in any cause or matter upon

such (if any) terms as the facts of the case may require, or to give any special directions as to the course of proceeding in any cause or matter, is unaffected by these orders.

#### XLVIII.—ORDERS TO TAKE EFFECT FROM DATE.

The following Orders and parts of Orders, comprised in the General Orders of the 3rd instant—namely, VI., section 9 of IX., section 3 of XI., section 8 of XIII., XV., XVI., XVII., XX., XXV., XXVI., XXVII., XXVIII., XXIX., XXX., XXXI., XXXII., XXXIII., XXXIV., XXXV., XXXVI., XXXVIII., XXXIX., XL., XLI., XLII., XLIII., XLIV., XLV., XLVI.—are to take effect from the date hereof, as to all suits, as well as those now pending, as those subsequently instituted. (*Ord. 1, 6th June, 1853.*)

#### XLIX.—GUARDIANS AD LITEM.

A party desirous of appointing a guardian for him to defend a suit, may go before a judge or master with the proposed guardian, and the judge or master may appoint such guardian if he shall think fit to do so. But he must be satisfied by affidavit that such proposed guardian is a fit person and has no interest adverse to that of the person of whom he is to be the guardian in the matter in question; and if the affidavit is not sufficient for this purpose, he may examine the proposed guardian, or the person making the affidavit *viva voce*, or require further evidence to be adduced until he is satisfied of the propriety of the appointment. (*Ord. 2, 6th June, 1853.*)

As to appointment of guardian *ad litem*, see *Ord. 13, s. 6*, and notes; also *Ord. 53*.

#### L.—SOLICITORS.

It is ordered that whenever hereafter any solicitor of this court shall be struck off the roll of solicitors, or be prohibited from practising as a solicitor, by order of this

court, for malpractice or misconduct as a solicitor, or other sufficient cause, the registrar of this court shall forthwith certify such dismissal or prohibition, and the grounds thereof expressed in general terms under the seal of this court, and shall transmit such certificate to each of the superior courts of Upper Canada.

And that this court on receipt of any similar certificate from the court of Queen's Bench, or court of Common Pleas, of any attorney of either of the said courts respectively, having been struck off the roll of such court, or prohibited from practising therein, shall thereupon take proceedings for striking such person, being a solicitor of this court, from the roll of solicitors; or for prohibiting his practising therein according to the course and practice, and in like manner and under like circumstances observed in similar cases in the superior courts in England. (*Ord. 6th Feb., 1854.*)

#### LI.—MOTIONS FOR DECREE—SETTING DOWN.

It is ordered, that in future all motions for decrees, and motions by way of appeal from the master's report, are to be set down in a paper of motions and will be called on in their order, after other motions are heard. (*Ord. 30th April, 1855.*)

Motions for decree must now be set down not less than ten days before the day for which notice is given, *Ord. 68, s. 1.*

#### LII.—EXAMINATION OF WITNESSES AND PARTIES.

Witnesses and parties may be examined before any examiner of this court, in those counties in which there may be no deputy-master, until the appointment of a deputy-master in any such county. (*Ord. 17th Sept., 1856.*)

It is doubtful if this order is now in force. At all events it now applies only to the evidence in support of interlocutory proceedings. The chief object in making circuits was that all the evidence might be taken before one of the judges, and since the passing of the orders of February, 1857, the court will not direct the examination of witnesses to be taken under

this order, although consented to by the parties, *Phelan v. Phelan* 6 Grant 384.

No evidence to be used on the hearing of a cause, is to be taken before any examiner or officer of the court, unless by the order first had of the Court or a Judge thereof, *Ord. 97, s. 1.*

### LIII.—GUARDIANS, AFTER DECREE.

When infants or persons of unsound mind, not so found by inquisition, are made parties to suits after decree, or are served with notice of motion under Order XV. of the general orders of June, 1853, guardians *ad litem* are to be appointed for them in like manner as they are now appointed at any time after bill filed; and this order is to take effect from the date hereof as to all suits as well those now pending as those hereafter to be instituted. (*Ord. 8th Nov. 1856.*)

For the mode of proceeding to obtain the appointment of a guardian *ad litem* before decree, or in suit commenced by bill, see *Ord. 13, s. 5; Ord. 49.*

### LIV.—SERVICE ON CORPORATIONS.

1. When service of a bill of complaint has been made within the jurisdiction of the court, upon a corporation aggregate, by personal service thereof on the mayor, warden, reeve, president, or other head officer, or on the township, town, city or county clerk, cashier, manager, treasurer, or secretary of such corporation, or of any branch or agency thereof in Upper Canada, or other person discharging the like duties, and when no answer has been filed to such bill within twenty-eight days from the service thereof, the plaintiff may, after the expiration of twenty-eight days from the service of such bill, apply to the court *ex parte*, for an order to take the bill *pro confesso*, and the court upon being satisfied of the due and proper service of such bill of complaint, and that no answer has been filed thereto by such corporation, may, if it think fit, order that the bill be taken *pro confesso* against such corporation. (*Ord. 17th March, 1857.*)



Where the defendants are a corporation the plaintiff cannot obtain the order *pro confesso* on precept, but only on an application in chambers. Order 9, s. 4, does not apply to the service of a bill of complaint on a corporation, *Counter v. The Commercial Bank*, 4 Grant 230.

The order permitting the service of the bill upon the agent of a corporation aggregate does not authorize service upon agents of corporations within Upper Canada, *Campbell v. Taylor*, Cham. R. 2; if the head office of the corporation be situated within Upper Canada service must be effected at same; if without, at any agency, *Howland v. Grierson*, 5 U. C. L. J. 19.

2. In cases where a foreign corporation aggregate, defendant to a bill of complaint, has no branch or agency in Upper Canada, then upon application to the court, supported by such evidence as may satisfy the court, in what place or country such corporation is situated, the court may order that an office copy of the bill may be served on such corporation in such place or country, or within such limits, and by personal or other service on such officer of such corporation as the court may think fit to direct. Such order is to limit a time (depending on the place of service) within which such defendant is to answer or demur to the bill, or obtain from the court further time to make defence to the bill, and where such corporation has neglected to answer or demur to such bill within the time limited by the order authorizing such service, the plaintiff may apply to the court *ex parte* for an order to take the bill *pro confesso* against such corporation, and the court being satisfied of the due service of the said bill according to the exigency of such order, and that no answer has been filed for such corporation, may, if it think fit, order the same accordingly.

The necessity for an order permitting service out of the jurisdiction is now done away with, *Ord.* 101; but the endorsement on the office copy of the bill must be varied to suit the time allowed for answering, according to the distance of the place where the service is effected.

3. Such order to take the bill *pro confesso* does not require to be served, and all further proceedings may be



*ex parte* against such defendant unless the court order otherwise.

This section is merely a copy of order 18, s. 7.

4. This order is to apply as well to all suits and matters now depending in this court, as to those hereafter to be commenced.

#### LV.—EXAMINATIONS OUT OF TERM.

Whereas it is absolutely necessary for the proper despatch of business in the court, that the change hereinafter provided be made in the practice as regards the examination of witnesses and parties; it is therefore ordered that all examinations, out of examination term, of parties or witnesses whether in a suit or in any matter or otherwise, be taken until further order before a deputy-master, or before a special examiner appointed for that purpose, unless the court or a judge thereof in chambers shall otherwise order upon application to be made for that purpose, which may be *ex parte*, but must be supported by affidavits setting forth the special grounds on which it is made. (*Ord. 6th April, 1857.*)

#### LVI.—EXAMINATION OF WITNESSES.

The orders numbered XXIII. and XXV. of the orders promulgated on the 3rd day of June, 1853, are hereby abrogated and discharged.

1. The plaintiff is to select the place at which the witnesses in the cause are to be examined, which may be any one of the places at which examinations are held, as hereinafter provided. The place selected is to be designated in the margin of the bill of complaint; and the witnesses of all parties are to be examined at the place so designated before one of the judges of this court, unless otherwise ordered. (*Ord. 2, 23rd Dec., 1857.*)

2. Any party to the suit may apply to the court, upon notice to all parties, to change the venue, and thereupon

the court is to make such order as to the taking of the evidence in the cause as the circumstances of the case may require ; and such order is to be upon such terms and conditions, as to costs or otherwise, as the court may think right to impose.

3. Witnesses resident out of the jurisdiction may be examined, as heretofore, upon commission.

The costs of a foreign commission form part of the costs in the cause, *Colborne v. Thomas*, 4 Grant 169.

Where a defendant refused to attend before commissioners appointed to take his evidence abroad, the usual order to set the cause down to be taken *pro confesso*, was made, *Prentiss v. Bunker*, 4 Grant 147.

4. The following terms are fixed for the examination of witnesses at the undermentioned places, viz. :

The places mentioned in this section as it was originally promulgated, have been varied. The towns at which witnesses are examined and causes heard are: on the Home Circuit—Toronto, Hamilton, Brantford, Simcoe, Guelph, Whitby, and Barrie; on the Western Circuit—Sandwich, Chatham, London, Sarnia, Woodstock, and Goderich; on the Eastern Circuit—Cobourg, Belleville, Kingston, Brockville, Ottawa, and Cornwall.

5. No rules to produce witnesses or pass publication are to be taken out. When issue has been joined in a cause three weeks before the commencement of the next ensuing examination term, at the place where the venue has been laid, publication is to pass at the close of such term; and when issue has been joined less than three weeks before the commencement of the next ensuing examination term, at the place where the venue has been laid, publication is to pass at the close of the following term.

Under the former practice, when the witnesses were examined during one term, and the cause heard on some day during the next hearing term, an application might be made to open publication and permit further evidence to be given, but the court granted such applications with great difficulty, and only under special circumstances, see *Waters v. Shade*, 2 Grant 218. In that case V. C. Esten said, "It is a sound rule to lay down, that such applications should never be granted unless it appears that notwithstanding due and reasonable diligence has been used, the evidence proposed to be taken could not have been obtained in the ordinary course." But where publication had passed shortly before a motion to open was made by

the plaintiff, and it was proved that the defendant had examined witnesses, but the plaintiff had not, and where it was sworn by the plaintiff and others that the evidence was material, and that the delay had arisen from the poverty of the plaintiff, publication was opened on payment of costs, *Taylor v. Shoff*, 3 Grant 153.

Since the recent orders requiring the hearing to be proceeded with immediately after the examination, it is difficult to say what course will be followed, when it is desired to adduce further evidence. It is presumed some practice will be introduced similar to that in the common law courts, where new trials are granted on the discovery of further evidence.

6. At any time after the issue joined, the case may be set down for the examination of witnesses by any party to the cause who has witnesses to examine.

7. The party who desires to have a cause set down for the examination of witnesses is to enter it for that purpose with the registrar, or deputy-registrar, at the place where the venue has been laid at least fourteen days before the commencement of the next ensuing examination term.

8. The registrar or deputy-registrar is to prepare a list of all causes entered for examination, and each cause is to be set down in such list in the order in which it has been entered with the registrar, and causes are to be called on according to the registrar's list.

If the plaintiff is not ready to proceed, the defendant is entitled to have the cause struck out of the paper, with costs of the day, *Cobourg & Peterborough Rail. Co., v. Covert*, 7 Grant 411; overruling, *Wallace v. McKay*, Cham. R. 67.

9. Notice that the cause has been set down for the examination of witnesses is to be served by the party setting the same down upon all parties at least fourteen days before the commencement of the examination term during which such evidence is to be taken, which notice may be in the form set forth in schedule A. to these orders annexed, but no appointment is to be taken out and no list of witnesses furnished.

10. The witnesses of all parties are to be examined during the term for which the cause has been set down

unless the court shall have seen fit, upon a previous application, to postpone such examination; or unless the judge before whom the evidence is to be taken, shall see fit to postpone such examination, or to allow time for the production of further evidence; and when such examination is postponed in the manner aforesaid, or when time is allowed for the production of further evidence, the order is to be upon such terms, as to the costs or otherwise, as the court, or the judge, may think it right to impose.

11. Where differences arise as to the conduct of the examination, the judge before whom the evidence is being taken, is to prescribe the order in which the several parties are to adduce their witnesses, or to give such directions as to the general conduct of the examination, as the circumstances of the case may require; and the evidence of any person who declines to produce his witnesses when called upon is to be altogether excluded, unless the judge shall order otherwise.

12. Any witness may be recalled for further examination, as in trials at *nisi prius*, without any order of the court having been obtained for that purpose.

13. Articles are not to be filed in future for the purpose of discrediting a witness; but witnesses may be called for that purpose, without the leave of the court; and they are to be examined at the time and place fixed for the examination of the other witnesses in the cause, unless the judge before whom the evidence is being taken shall otherwise order.

14. Depositions are to be taken and expressed in the first person of the deponent.

15. Any person is to be at liberty to make use of the depositions of any witness adduced by any other party to the suit, subject, however, to such terms, if any, as to the costs of taking such evidence, as the court may think it right to impose.

16. The court, if it see fit, may require the production

and oral examination before itself of any witness or party in any cause, matter or proceeding, and is to direct the costs of and attending the production and examination of such witness or party to be paid by such of the parties to the suit, or in such manner as it may think fit. (15 & 16 Vic. c. 86, s. 39.)

This section authorizes the examination of those witnesses only who have been examined in the cause; witness ought to be previously informed as to what he is to be examined upon, *East-Anglian Railway v. Goodwin*, 6 W. R. 564. The proper period at which the discretion given to the Court by this return is to be exercised, is at the hearing of the cause, *Raymond v. Brown*, 5 Jur. N. S. 1046.

#### LVII.—SETTING DOWN THE CAUSE.—HEARING.

6. If the plaintiff neglects to set down the cause to be heard within one month after publication has passed, any defendant may cause the same to be set down, and may serve notice of hearing on the parties to the cause.

Where the defendant set a cause down for hearing before the time limited by this section had expired and the plaintiff moved to strike the cause out of the list for irregularity, it was struck out with costs, although by the plaintiff's delay in giving notice of the irregularity, the defendant was unable again to set the cause down for the ensuing term, *City of Toronto v. McGill*, Cham. R. 16.

7. Where a defendant makes default at the hearing of a cause, the court is to make such decree as it may think fit; this decree is to be absolute in the first instance, without giving the defendant a day to shew cause, and such decree is to have the same force and effect as if the same had been a decree *nisi* in the first instance, and had been afterwards made absolute in default of cause shewn by the defendant. (*Eng. Con. Ord.* 23, r. 12.)

Under this rule the plaintiff takes such a decree as on the evidence and pleadings he is entitled to, *Evans v. Williams*, 6 Beav. 118; *Hakewell v. Webber*, 6 Hare 541.

Where the affidavit of service of the subpoena to hear judgment is irregular, the cause must be set down again, *Evans v. Evans*, 2 Keen. 604; a decree taken on production of an insufficient affidavit of service, is irregular, *Powell v. Martin*, 1 J. & W. 292; *Rigg v. Wall*, 3 M. & C. 508.

8. If the plaintiff causes the bill to be dismissed, on his own application, after it has been set down to be heard; or if the cause is called on to be heard, and the plaintiff makes default, and by reason thereof the bill is dismissed; in either case such dismissal is to be equivalent to a dismissal on the merits, unless the court order otherwise, and may be set up in bar to another suit for the same matter. (*Eng. Con. Ord.* 23, r. 13.)

As the plaintiff has the entire controul of the suit, he may at any time before the hearing, obtain an order dismissing the bill upon payment of the defendant's costs; and it makes no difference whether the bill is filed on his own behalf only, or on behalf of himself and all others of the same class, *Curtis v. Lloyd*, 4 M. & C. 194; *Manton v. Roe*, 14 Sim. 353. Where there are several plaintiffs they must all join in the application to dismiss.

After the cause has been heard and is standing for judgment, the plaintiff cannot dismiss his bill except on a special application, *Smith v. Port Hope Harbour Co.* 6 U. C. L. J. 189.

After decree, a bill cannot be dismissed, except by consent, *Cooper v. Lewis*, 2 Phill. 178, and even then only upon a rehearing, *Lashley v. Hogg*, 11 Ves. 602; whether instituted by the plaintiff on his own behalf, *Bluck v. Colnaghi*, 9 Sim. 411; or on behalf of himself and others of the same class, *Handford v. Storie*, 2 S. & S. 196.

The proper course after decree, is to apply for an order to stay all proceedings, which order will be made by consent, or upon a fit case being proved, *Egg v. Devey*, 11 Beav. 221.

Where the defendant submits to the plaintiff's demand, and the only question between the parties is the costs of the suit, it ought not to be proceeded in, but an application should be made, to the court, to avoid the expense of further proceedings, *Sivell v. Abraham*, 8 Beav. 598; if, however, there be any question in dispute to which the defendant does not submit, the court will not interfere summarily, and stop the suit, *Field v. Robinson*, 7 Beav. 66; *McNaughtan v. Hasker*, 12 Jur. 956.

The defendant is not entitled to a dismissal on plaintiff's default to appear, without producing a regular affidavit of service of the notice of hearing, *Rigg v. Wall*, 3 M. & C. 505.

9. The practice of excepting to bills, answers or other proceedings for scandal or impertinence is abolished. But if upon the hearing of any cause or matter the court is of opinion that any pleading, petition or affidavit or any part of such pleading, petition, or affidavit is scan-



dalous, the court may order such pleading, petition or affidavit to be taken off the file, or may direct the scandalous matter to be expunged, and is to give such direction as to costs as it may think right.

10. A motion to have any pleading, petition, or affidavit taken off the file for scandal, or to have the scandalous matter expunged, may be made at any time before the hearing of the cause or matter.

11. If, upon the hearing of any cause or matter, the court is of opinion that any pleading, petition, or affidavit, is of unnecessary length, the court may either direct payment of a sum in gross or in lieu of taxed costs therefor, or it may direct the taxing-officer to look into such pleading, petition, or affidavit, and to distinguish what part or parts thereof is or are of unnecessary length, and to ascertain the costs occasioned to any party by any unnecessary matter; and the court is to make such order as it thinks just, for the payment, set off, or other allowance of such costs, by the party, his solicitor, or counsel.

12. Causes may be set down to be heard on further directions for any court day, but notice thereof must be served at least SEVEN days before the day for which the cause has been set down.

When the decree made in a cause refers any matters to the master, reserving the final disposition of them until after he has made his report, it is necessary in order to have a complete termination of the suit, that the cause should be set down to be heard "on further directions." This has to be repeated as often as there are any further directions reserved by the last decree. If costs are also reserved by the decree the cause should be set down for hearing "on further directions and as to the question of costs."

Further directions are reserved only in those cases where a reference is made to the master to take accounts or make enquiries, or where an issue is directed. If the further directions are reserved until after the master has made his report, the cause cannot be set down until the master has made his report and it has been confirmed.

Where the master makes a separate report in pursuance of a decree, or a report not in pursuance of a decree or decretal order, the cause cannot be brought before the court or further directions, but the party must apply by petition for consequential directions, *Van Kamp v. Bell*, 3 Madd. 430.

If matters in issue at the first, be neither decided, put in a train of in-



vestigation, nor reserved, they must on further directions be treated either as abandoned, or as points on which the plaintiff was entitled to no order, *Passingham v. Sherborn*, 9 Beav. 424.

At the hearing on further directions, the liability of executors may be determined, *Pattenden v. Hobson*, 17 Jur. 406; but it is not proper at that stage, to direct an enquiry as to wilful default, *Coops v. Carter*. 2 DeG. M. & G. 292.

A cause cannot be set down to be heard on further directions, until after the master's report has been confirmed, because, until then any of the parties may appeal against the report.

The report becomes absolute, without order confirming the same at the expiration of fourteen days after the filing thereof, unless previously appealed from, *Orā*. 79; and no order to set down the cause is necessary,

Notice of the hearing must be served on all proper parties in the same manner as notice of the original hearing, at least seven days previous to the day for which the cause is set down. Parties added in the master's office who have appeared there and attended the proceedings should be served; and it is presumed they would be allowed their costs of attending.

The brief at the hearing on further directions should contain the decree and master's report, but the brief of the pleadings should also be in the hands of counsel. The court will not take notice of anything which does not appear from the decree and report; but the court has allowed an affidavit as to the plaintiff's conduct, made after the master's report to be read, on the question of costs, *Fallows v. Lord Dillon*, 2 W. R. 507; but subsequently the court rejected a similar affidavit as to the defendant's conduct, *Bateman v. Margerison*, 2 W. R. 607.

The decree made on further directions is settled, passed and entered, in the same manner as other decrees.

#### LVIII.—PROCEEDINGS IN SUITS FOR FORECLOSURE OR SALE.

1. In suits instituted by mortgagees or judgment creditors for sale or foreclosure, when all encumbrancers have not been made parties, or further enquiries are sought, the complainant is to bring into the master's office, together with the decree, a certificate from the registrar of the county wherein the lands lie, setting forth all the registered incumbrances which affect the property in the pleadings mentioned, and such other evidence as he may be advised; and upon his *ex parte* application for that purpose, the master is to direct all such persons as appear to him to have any lien, charge, or incumbrance upon the

estate in question, to be made parties to the cause. (*Ord. 6th Feb., 1858.*)

As all subsequent incumbrancers can under this section be made parties in the master's office, they should not be made parties to the bill. When they are made parties before the decree, the court will not allow any costs in respect of so making them parties.

Where it appears conducive to the ends of justice that parties interested in the equity of redemption, should be allowed to be made parties in the master's office, by reason of the parties so interested being numerous or otherwise, it shall be competent to the court, at the hearing or afterwards, to direct that parties so interested, may be made parties in the master's office, upon such terms as to the court shall seem fit; such order to be made only where one or more parties interested in the equity of redemption are already before the court, *Ord. 70.*

The judgment creditors of the mortgagees are necessary parties, and may be added in the master's office, *Sanderson v. Ince*, 7 Grant 383.

Where a plaintiff in a suit for foreclosure or sale asks a reference to the master to enquire as to encumbrancers, he takes such a reference at the peril of costs, if there are in reality no incumbrancers, *Hamilton v. Howard*, 4 Grant 581.

2. When the bill is filed by a subsequent incumbrancer seeking relief against a prior mortgagee, such mortgagee must be made a party previous to the hearing of the cause. But when the plaintiff in any such case prays a sale or foreclosure, subject to the prior mortgage, such mortgagee is not to be made a party either originally or in the master's office.

3. Upon the office copy of the decree to be served upon persons made parties in the master's office, under the provisions of this order, there must be endorsed a notice to the effect set forth in schedule A. to these orders annexed.

Parties added in the master's office must be served with office copies of the decree duly stamped; unstamped copies are insufficient, *Elliott v. Hellicell*, Cham. R. 6; *Feehan v. Hayes*, *Ibid.*

The copies of the decree may be made office copies by the deputy registrar in the county to which the reference is directed, *Ord. 66, s. 1.*

Under Con. Stat. U. C. c. 12, s. 70, the plaintiff may serve the attorney-at-law of a judgment creditor made a party under this order. If the attorney-at-law is served or accepts service as attorney, an affidavit must be

produced proving that he is the attorney on the roll of the judgment, in respect of which the judgment creditor is made a party.

The form of notice A. will be found in the appendix of forms.

4. When a reference has been directed as to incumbrances, or to settle priorities, in any case provided for by this order, the master, before he proceeds to hear and determine, is to require an appointment to the effect set forth in schedule B. to this order annexed, to be served upon all persons made parties before the hearing, whether the bill has been taken *pro confesso* against such persons or not.

For the form of appointment B. see appendix of forms.

5. When any person who has been duly served with an office copy of the decree, or with an appointment under the provisions of this order, neglects to attend at the time appointed, the master is to treat such non-attendance as a disclaimer by the party so making default; and the claim of such party is to be thereby foreclosed, unless the court order otherwise, upon application duly made for that purpose.

When a person made a party in the master's office appears and disclaims, he is not entitled to any costs, as by remaining inactive the same end will be attained as by disclaiming, *Hatt v. Park*, 6 Grant 553.

6. The master's report in the cases specified in this order must state the names of all persons who have been made parties in his office, and of those who have been served with the appointment hereinbefore provided. The names of such as have made default, having been duly served, must then be stated; and then the report must go on to settle the priorities, &c., of such as have attended, and these latter are to be certified as the only incumbrancers upon the estate.

7. Where a mortgagee has proceeded at law upon his security, he shall not be entitled to his costs in equity, unless the court, under the circumstances, shall see fit to order otherwise.

**LIX.—MASTERS AND DEPUTY-REGISTRARS.**

The masters and deputy-registrars appointed by this court, shall, in addition to the fees already payable to them, be entitled to receive upon the setting down of causes for the examination of witnesses, the sum of one pound ten shillings for each case to be set down. (*Ord. 6th Feb., 1858.*)

The fee payable to deputy-registrars on setting down causes for examination and hearing has been increased to two pounds, *Ord. 97, s. 2.*

**LX.—LONG VACATION.**

It is ordered that the time of the long vacation is not to be reckoned in the computation of the time appointed or allowed for the purpose of answering either an original or amended bill. (*Ord. 30th June, 1858.*)

The time of the long vacation is not reckoned in the computation of the time allowed for mending, or obtaining orders for leave to amend bills, setting down demurrers, or filing replications, or setting down causes under Order 18, *Ord. 5, s. 4.*

**LXI.—FEE ON SETTING DOWN CAUSES.**

That from and after the first day of July next, the fee payable to, and to be received by the registrar of this court, on the setting down of each cause, other than those ordered to be taken *pro confesso*, shall be the sum of ten shillings. (*Ord. 1, 13th April, 1859.*)

**LXII.—SOLICITORS TO ATTEND HEARING.**

The judges of this court, taking notice of the inconvenience and expense occasioned to the suitors in the court, by reason of the non-attendance of the solicitors of the parties or some of them at the times when such causes are called on to be heard, or during the hearing thereof, by reason of which non-attendance such causes are struck out of the paper, and cannot be restored without an expense which ought not to be sustained by the parties; or the hearing thereof is unnecessarily postponed, not only to the inconvenience of the parties to such causes, but

also to the inconvenience of parties to other causes ; do think proper hereby to order, in conformity with what the rules and practice of the court already require, that the solicitors for the several parties in all causes do attend in court when such causes are appointed to be heard, and during the hearing thereof. And that whenever, upon the hearing of any cause, it shall appear that the same cannot conveniently proceed by reason of the solicitor for any party having neglected to attend personally or by some person in his behalf, or having omitted to deliver any paper necessary for the use of the court, and which, according to its practice, ought to have been delivered, such solicitor shall personally pay to all or any of the parties such costs as the court shall think fit to award. (*Ord. 2, 13th April, 1859.*)

The solicitor is personally liable under this order, *Cook v. Broomhead*, 16 Ves. 133; *Courtney v. Stook*, 2 Dr. & W. 251.

The client not relieved by the consequences of the solicitor's neglect in ignorance of this rule without the consent of the other party, *Walmesley v. Froude*, 1 R. & M. 334.

As to restoring causes struck out on account of the absence of the counsel, see *Harvey v. Renon*, 12 Jur. 445; where, by accident, replication was not duly filed, *Atty. Gen. v. Fellows*, 6 Madd. 111.

#### LXIII.—SCHEDULE OF EXHIBITS.

In future the evidence read by each side must be stated distinctly by counsel, in order that the same may be entered by the registrar before the case is closed, in accordance with the order to that effect.

When judgment is reserved, the exhibits used upon the hearing must be deposited with the registrar for the use of the court. All exhibits deposited under this order must be described in a schedule, to be prepared by the party depositing the same. The schedule shall be in duplicate, one copy of which, signed by the registrar, shall be handed to the party depositing the exhibits, and the other retained for the use of the court.

When this order has not been complied with, the case will not be considered as standing for judgment, (*Ord. 3, 13th April, 1859.*)

As to entering evidence as read, see notes to order 43, s. 10.

#### LXIV.—PLEADINGS TO BE DIVIDED INTO PARAGRAPHS.

From and after the first day of July next, every bill and answer filed, and every affidavit to be used in any cause or matter, shall be written in a plain legible hand, and shall be divided into paragraphs, and every paragraph shall be numbered consecutively, and as nearly as may be shall be confined to a distinct portion of the subject. No costs shall be allowed for any bill, answer or affidavit, or part of any bill, answer or affidavit substantially violating this order; nor shall any affidavit violating this order be used in support of, or opposition to, any motion, without the express permission of the court. (*Ord. 4, 13th April, 1859.*)

#### LXV.—SHERIFF'S FEES.

The judges in pursuance of the authority vested in them under and by virtue of the statute in that behalf, do hereby order and direct that the sheriffs and coroners, in their several counties, shall be entitled to receive and take for the several services hereinafter mentioned, the fees specified for the same, and no other, or greater fees or allowance.

RECEIVING, filing, entering and endorsing every paper.....	£0	1	3
RETURN of all process and writs except subpoenas.....	0	2	6
WARRANT to bailiff on writ not executed by sheriff or deputy	0	2	6
SERVING each office copy bill, including affidavit of service	0	5	0
SERVING each warrant, notice, certificate, subpoena, or other paper.....	0	2	6
NE EXEAT—arrest on, when amount endorsed under £50...	0	5	0
£50, and under £100.....	0	10	0
£100, and over.....	1	0	0

**ATTACHMENT**—not defined, arrest on..... 0 10 0

Arrest upon attachment in the nature of an execution,  
when the sum endorsed is under £50..... 0 5 0  
Over £50, and under £100..... 0 10 0  
£100 or over..... 1 0 0

Besides poundage for sums endorsed when sum endorsed  
is under £100, at..... 5 per cent  
Exceeds £100, but is less than £1000, 5 per cent. for  
the first £100, and  $2\frac{1}{2}$  per cent. for the residue. £1000  
and over,  $1\frac{1}{4}$  per cent. on whatever exceeds £1000, in  
addition to the poundage allowed up to £1000

**SEQUESTRATION**—upon seizure of estate and effects under  
writ of sequestration..... 0 10 0

Schedule of goods taken in execution, including copy  
for defendant, if not exceeding 5 folios..... 0 5 0  
Each folio above 5..... 0 0 6

Removing or retaining property, reasonable and neces-  
sary disbursements, and allowance to be made by the  
master, or by order of the court or judge.

Poundage upon sequestration, followed by sale.

Where amount made under £100, at..... 5 per cent.  
£100, but under £1000, 5 per cent. for the first £100,  
 $2\frac{1}{2}$  per cent. for the residue. £1000, and over,  $1\frac{1}{4}$  per  
cent. on whatever exceeds £1000, in addition to the  
poundage allowed up to £1000, in lieu of all fees and  
charges for services and disbursements, except mileage  
in going to seize, and disbursements for advertising,  
and except disbursements necessarily incurred in the  
care and removal of property, to be allowed by the mas-  
ter in his discretion.

**FOR SERVICE NOT SPECIFIED**—The like charges as are allow-  
ed at common law for analogous services.

—Ord. 30th, April, 1859.

The court will permit service of pleadings to be effected by parties to  
the suit, and will allow the same fees upon taxation, as if served by third  
parties, *McClure v. Jones*, 6 Grant 383.

In moving for an order upon a sheriff to return papers sent to him for  
service, the proper mode of proceeding is to give notice of motion; but  
*quære*, whether a sheriff can be compelled to serve any papers other than  
process issuing from the court, *Porter v. Gardner*, Cham. R. 15.



**LXVI.—OFFICE COPIES OF DECREES.—RETURNS BY  
DEPUTY REGISTRARS.**

1. Ordered, that all office copies of decrees to be served on parties, added in the master's office, may be certified by the deputy-registrar where the reference is made to.

2. Ordered, that the deputy-registrars do transmit to the registrar of this court, at Toronto, on the first day of January, April, July, and October, in each year, a list of all bills filed with them respectively during the preceding quarter of the year, *Ord. 5th Oct., 1859.*

**LXVII.—PRO CONFESSO—SETTING DOWN.**

Where a bill has been ordered to be taken *pro confesso*, the cause may thereupon be set down to be heard; but the day for which the same is so set down is to be not less than ten days from the setting down thereof, unless the court think fit to appoint a special day for the hearing thereof. (*Ord. 29th June, 1861.*)

This does not in any way repeal *Ord. 14, s. 1*, which provides that a cause which has been taken *pro confesso*, may be heard at any time after the expiration of three weeks from the date of the order.

**LXVIII.—MOTION FOR DECREE.**

1. Where a party has given notice of motion for decree, he is to set the cause down to be heard on such motion not less than ten days before the day for which such notice is given, unless he shall have obtained an order allowing a less time for such purpose.

Before this order, a cause might have been set down on motion for decree, at any time before the court entered upon the paper, *Clarke v. Hall*, 7 Grant 339.

2. Motions for decrees are to be allowed only in three classes of cases, namely:—*First.* Where there is no evidence. *Second.* Where the evidence consists only of documents, and such affidavits as are necessary to prove their execution or identity, without the necessity of any cross-examination. *Third.* Where infants are concerned,

and evidence is necessary only so far as they are concerned for the purpose of proving facts which are not disputed ; but this order is not to apply to cases in which, but for this order, the court would grant leave to serve short notice of motion for decree in order to prevent irreparable injury. (*Ord. 29th June, 1861.*)

As to service of notice of motion for decree, and the power of the court on such a motion, see *Ord. 16, and notes.*

#### LXIX.—DELIVERY OF POSSESSION AFTER FINAL FORECLOSURE.

In any suit for foreclosure or for redemption, the mortgagor, or other person entitled to the equity of redemption, being in possession of the premises foreclosed, may be ordered to deliver up possession of the same upon or after final order of foreclosure, or for the dismissal of the bill, as the case may be. (*Ord. 29th June, 1861.*)

This order is merely an extension of *Ord. 32. s. 1*, which provided for delivery of possession being ordered against the mortgagor only. As to time when order may be obtained, see *Ord. 32, s. 1' and notes.*

#### LXX.—PARTIES INTERESTED IN THE EQUITY OF REDEMPTION MADE PARTIES IN THE MASTER'S OFFICE.

In any case in which it shall appear conducive to the ends of justice that parties interested in the equity of redemption should be allowed to be made parties in the Master's Office, by reason of the parties so interested being numerous or otherwise, it shall be competent to the court, at the hearing, or afterwards, to direct that parties so interested, may be made parties in the Master's office, upon such terms as to the court shall seem fit ; such order to be only made where one or more parties interested in the equity of redemption are already before the court. (*Ord. 29th June, 1861.*)

As to adding parties in the master's office, see *Ord. 42, s. 15 ; Ord. 58.*

**LXXI.—DEFENDANT ABSCONDING, OR BEING CONCEALED.**

In case it appears to the court by sufficient evidence, that any defendant against whom a bill has been filed, has been within the jurisdiction of the court at some time, not more than two years before the filing of the bill, and that such defendant, after due diligence, cannot be found to be served with an office copy of the bill, and that there is good reason to believe that he has absconded from the jurisdiction, or that he is concealed within the same, the court may make such order as is prescribed by section 7th of the 9th of the General Orders of June, 1853. (*Ord. 29th June, 1861.*)

This order is only an extension of the former orders on the subject, see *Ord. 9, ss. 7 & 8.*

**LXXII.—APPOINTMENTS AND NOTICES IN THE MASTER'S OFFICE.**

1. Where the master shall direct that parties not in attendance before him shall be notified to attend before him at some future day, or for different purposes at different future days, it shall not be necessary to issue separate warrants, but the parties shall be notified by one appointment, to be signed by the Master, of the proceedings to be taken, and of the times by him appointed for taking the same. (*Ord. 29th June, 1861.*)

2. In cases where parties are notified by appointment from the master, of proceedings to be taken before him, no warrants shall be issued as to such parties in relation to the same proceedings.

3. Parties making default upon such appointments, are to be subject to the same consequence as if warrants had been served upon them.

Prior to the passing of this order it was necessary to issue a separate warrant for each appointment before the master. Warrants issued under this order require the parties served to attend for the several purposes underwritten on the several days underwritten, and care should be taken in underwriting the warrant to set out the different days, and the business to be proceeded with upon each.

## LXXIII.—TAXATION OF COSTS.

Where costs are awarded to be paid, it shall be competent to the master in ordinary to tax the same, without any express reference to him for that purpose. (*Ord. 29th June, 1861.*)

## LXXIV.—PAYMENT OF MORTGAGE MONEY.

1. Where the master is directed to appoint mortgage money to be paid at some time and place, he is to appoint the same to be paid into some bank at its head office, or at some branch or agency office of such bank, to the joint credit of the party to whom the same is made payable, and of the Registrar of this court; the party to whom the same is made payable to name the bank into which he desires the same to be paid, and the master to name the place for such payment. (*Ord 29th June, 1861.*)

2. Where money is paid into some bank, in pursuance of such appointment aforesaid, it shall be competent to the party paying in the same, to pay the same either to the credit of the party to whom the same is made payable, or to the joint credit of such party and the Registrar.

- If the same be paid to the sole credit of the party, such party shall be entitled to receive the same without the order of this court.

3. Where default is made in the payment of money appointed under this order to be paid into any bank, the certificate of the cashier, where the same is made payable, or of other, the like bank officer, shall be sufficient evidence of such default. Where the affidavit of the party entitled to receive the same is by the present practice required, the like affidavit shall still be necessary.

Even after the final order of foreclosure has been obtained the defendant may apply for an extension of the time for payment of the mortgage money.

The order is not obtained as of course, and the application will be

refused when the excuse for default is not satisfactory and the security is not ample, *Eyre v. Hanson*, 2 Beav. 478; *Nanny v. Edwards*, 4 Russ. 124; an affidavit by the solicitor that the defendant was exerting himself to raise the money was held insufficient, *Anon*, 4 Grant 61.

The enrolment of the final order is no objection to the application if made promptly, and the court has the means of giving the mortgagee immediate payment, *Thornhill v. Manning*, 1 Sim. N. S. 451. An enlargement of the time may be given oftener than once.

On applying the defendant should shew a reasonable excuse for nonpayment on the day appointed, a probability of redeeming at the expiry of the extended time, and that the property is ample security.

At one period the terms on which an application was granted appear to have been to require payment of the interest and costs by an early day, and to extend for six months the period for payment of the principal money, *Whatton v. Craddock*, 1 Keen. 289; *Brewin v. Austin*, 2 Keen 212; *Geldard v. Hornby*, 1 Hare 251; and this rule seems still followed where the security is not ample, *Fisher on Mortgages*, 610.

The course more generally followed now is to extend the time upon payment of the costs of the application, charging defendant with interest on the gross amount reported due, *Holford v. Yate*, 1 K. & J. 677; *Whitfield v. Roberts*, 7 Jur. N. S. 1268; and see *Howard v. Macara*, Cham. R. 27.

#### LXXV.—CONDUCT OF SALE.

Where, upon a bill for foreclosure, a sale is asked for by a defendant, it shall be competent to the court to require as a condition that the party asking the same, shall conduct the sale at his own expense, dispensing in such case with a deposit, if the court shall think fit. (*Ord. 29th June, 1861.*)

The defendant is not entitled to insist upon a sale instead of a foreclosure against the consent of the mortgagee, without paying in the usual deposit, upon his undertaking the conduct of the sale, *Taylor v. Walker*, 8 Grant 506

#### LXXVI.—NOTICES, APPOINTMENTS, &c., HOW TO BE SERVED.

The General Order of this Court, number 43, is altered and varied in the following particulars:

Where the pleadings in any cause have been filed in the office of the Registrar of the Court, at Toronto, or in the office of any Deputy-Registrar, all notices,

appointments, warrants, and other documents and written communications in relation to matters transacted in Court or Chambers, or in the office of the Master or Registrar, which do not require personal service upon the party to be affected thereby are to be served upon the solicitor, when residing in the city of Toronto; and when the solicitor to be served resides elsewhere than in the city of Toronto, then such notices, appointments, warrants, and other documents, and written communications aforesaid, may be served either upon such solicitor, or upon his Toronto agent, named in the "Solicitors' and Agents' Book;" unless the Court, or a Judge thereof, or a Master, before whom any such proceeding may be had shall give any direction as to the solicitor upon whom any such notice, appointment, warrant, or other document or written communication shall be served. And if any solicitor neglect to cause such entry to be made in "the Solicitors' and Agents' Book," as is required by the above general order, the leaving a copy of any such notice, appointment, warrant, or other document, or written communication for the solicitor so neglecting as aforesaid, in the office of the Registrar, is to be deemed sufficient service, unless the Court direct otherwise. (*Ord. 29th June, 1861.*)

#### LXXVII.—AFFIDAVITS ON APPLICATIONS TO COURT.

1. Section 3, of General Order, number 40, is hereby abolished, except as to affidavits in support of *ex parte* applications; but this order is not to be taken to warrant the taxation of the costs of obtaining office copies of affidavits, for use upon the hearing of any matter, by the party on whose behalf they are filed.

2. Affidavits, except upon *ex parte* applications, must be filed before they can be used; and affidavits in answer must be filed not later than the day before that appointed for the hearing of the motion. (*Ord. 29th June, 1861.*)

All the affidavits upon which any notice of motion is founded must be filed at the time of the service of such notice of motion, *Ord.* 40, s. 2.

As to filing affidavits on motion for decree, see *Ord.* 16.

As to giving notice of intention to read affidavits, and searching for affidavits referred to in a notice of motion, see *Ord.* 39, s. 1, and notes.

**LXXVIII.—PROCEEDING WHERE STATE OF ACCOUNT  
CHANGED AFTER DECREE OR REPORT.**

1. In cases where after a decree or decretal order for the sale or foreclosure of mortgage property the state of the account ascertained by decree or decretal order, or by the report of the Master, shall be changed by payment of money, by receipt of rents and profits, by occupation, rent, or otherwise, before final order for foreclosure or sale obtained, it shall be competent to the plaintiff or other party to whom the mortgage money is payable, to give notice to the party by whom the same is payable, that he gives him credit for a sum certain, to be named in such notice, and that he claims that there remains due to him in respect of such mortgage money a sum certain, to be also named in such notice; and in case, upon the final order for foreclosure or sale being applied for, the judge shall think the sums named in such notice proper to be allowed and paid under the circumstances, the order for final foreclosure is to go without further notice, unless the judge shall direct notice to be given: or it shall be competent to the party to whom the mortgage money is payable, to apply to a Judge in Chambers for a reference to a Master, or for an appointment to fix such sums respectively, and in the latter case either upon notice, or *ex parte*, as the Judge may think fit, and the order to be made thereupon is to be served, or service thereof dispensed with, as the Judge may direct. (*Ord.* 29th June, 1861.)

This order applies only where the state of the account is changed before the arrival of the day appointed for payment of the mortgage money. Where after the day appointed for payment of the amount due, the plaintiff goes into possession, or receives rents, he is entitled to a final order of



foreclosure, without a new account being taken, *Constable v. Howick*, 5 Jur. N. S. 331; *Greenshields v. Blackwood*, Cham. R. 60.

2. It shall be competent to the party to whom such notice may be given to apply to a Judge in Chambers for an appointment to ascertain and fix the amounts proper to be allowed and paid instead of the amounts mentioned in such notice; or for a reference to a Master for the like purpose; and in case the Judge shall think a reference to a Master proper, the same may be made *ex parte* unless the Judge shall otherwise direct.

### LXXIX.—APPEALS FROM MASTER'S REPORT.

1. Section 17 of General Order 42, is altered and varied in the following particular:

Reports become absolute, without order, confirming the same at the expiration of fourteen days after the filing thereof, unless previously appealed from. An appeal shall lie to the court upon motion, at any time from the signing of the report, to the expiration of fourteen days from the filing of the same in respect of the finding of the Master upon any matter presented in his office for his decision, without objections or exceptions being previously taken. (*Ord. 29th June, 1861.*)

If any of the parties are dissatisfied with the master's report, an appeal from it may be brought at any time within fourteen days after it is filed; and the service of a notice of motion by way of appeal within the fourteen days will prevent the report being confirmed, although the appeal may not be heard till after the expiring of the fourteen days, *Grimshaw v. Parks*, 6 U. C. L. J. 142.

When the fourteen days have been allowed to pass without serving notice of appeal, the court may, under special circumstances, give leave to appeal; but such leave can be obtained only upon motion, notice of which must be given, *Cozens v. McDougal*, Cham. R. 29; *Larkin v. Armstrong*, Cham. R. 31.

Where the master made a clerical error in his report, apparent on the face of it, the court made an order correcting the report on the *ex parte* application of the plaintiff, *White v. Courtney*, Cham. R. 11; but where the master, in proceeding to take an account under a decree on further directions, finds he has made a mistake in taking the accounts under the original

decree, he is not at liberty to correct such mistake by his subsequent report. The master having, without the order of the court, reviewed his first report, and corrected by his subsequent report an error found in the first, it was held that he had exceeded his jurisdiction, and that the objection being apparent on the face of the report, the objecting party was not driven to appeal, *Crooks v. Street*, Cham. R. 78.

The master's report is *prima facie* evidence of what it contains, unless appealed from, and no motion founded on such report can be entertained while the appeal is unheard, *Nichols v. McDonald*, 6 Grant 594.

2. It shall be competent for any party affected by the report to file the same, or a duplicate thereof, and the filing of such duplicate shall have the same effect for the purposes of this order as the filing of the report, by the party taking the same.

#### LXXX.—AFFIDAVITS,—SOURCES OF KNOWLEDGE.

Each statement in an affidavit, which is to be used as evidence at the hearing of the cause or matter, or of a motion for a decree or other motion, or on any proceeding before the court, (or before the judge in Chambers,) shall shew the means of knowledge of the person making such statement. (*Ord. 10th July, 1861.*)

#### LXXXI.—REPORT ON SALE.

1. It is ordered that sections 8 and 9, of the 36th of the General Orders of this Court of the third of June, 1853, be and the same are hereby repealed; and it is further ordered, that in future all sales are to be with the approbation of one of the Masters of this Court, who is to report the same to the Court, such report to be in the form hereunder set forth, or as near thereto as circumstances will permit, that is to say: "IN CHANCERY."

*Title of Cause.* "Pursuant to the decree (or order) of this honourable Court, bearing date the———day of———and made in this cause, I have, under the General Orders of this Court, in the presence of (or after notice to) all parties concerned, settled an advertisement and particulars and conditions of sale for the sale of the

lands mentioned or referred to in the said decree, (*or order,*) and such advertisement having, according to my directions, been published in the (naming the newspaper or newspapers) once in each week for the four weeks immediately preceding the said sale, (*or as the case may be,*) and bills of the said sale having been also as directed by me published in different parts of the township, (*town or city*) of——— and the adjacent country and villages, (*or as the case may be,*) the said lands were offered for sale by public auction according to my appointment, on the——— day of——— by me, (or by Mr.——— of——— appointed by me for that purpose, auctioneer,) and such sale was conducted in a fair, open and proper manner, when——— of——— was declared the highest bidder for and became the purchaser of the same at the price or sum of £—— (or when sold in different lots, that A. B. became the purchaser of lot No. 1, at the price or sum of £——, C. D., of lot No. 2, at the price or sum of £——, as the case may be;) all which having been proved to my satisfaction by proper and sufficient evidence, I humbly certify to this honourable Court, (*Ord. 22nd Feb., 1862.*)

A master's report on a sale must be filed, in the same manner as other reports, before it can be confirmed.

As to applications to open biddings before and after the confirmation of the report on sale, see notes to *Ord. 36, s. 10.*

2. Under the printed conditions of sale is to be printed a blank form of contract in these words, or to this effect: "I agree to purchase the property (or lot No. ——) mentioned in the annexed particulars, for the sum of £——, and upon the terms mentioned in the above conditions of sale," which is to be signed by the purchaser. Witness.

3. This order is to take effect on and after the eighth day of March next.

## LXXXII.—SITTINGS OF COURT.

1. Sections 1, 2, 3, 4 and 5, of order number three of the General Orders of 23rd of December, 1857, are hereby abrogated and discharged, (*Ord. 28th April, 1862.*)

2. The Judges of the court will sit separately and by alternate weeks, as follows :—One judge will sit daily in each week for the despatch of all business other than re-hearings and Chamber business.

3. The business before such Judge will be taken as follows :—Monday, Motions ; Tuesday, Wednesday, Hearings *pro confesso* ; motions for decree ; further directions ; appeals from masters reports. Thursday, Friday, Saturday, Hearing of causes ; demurrers, (excepting during the re-hearing term.)

## LXXXIII.—SETTING DOWN CAUSES.

The party who desires to have a cause set down to be heard, is to enter it with the registrar for that purpose, at least fourteen days before the day for which the same is set down, (*Ord. 26th April, 1862.*)

## LXXXIV.—LISTS TO BE PREPARED BY THE REGISTRAR.

The Registrar is to prepare lists of all causes entered for hearing, making a separate list of all the causes to be heard before each judge. Each cause is to be set down in the order in which it has been entered with the Registrar. Causes are to be called on and heard according to the Registrar's list, unless the court order otherwise. (*Ord. 28th April, 1862.*)

## LXXXV.—NOTICE OF HEARING.

Notice of hearing must be served by the party setting down the cause, upon all proper parties, for a proper day falling within the week in which the Judge in whose list the same is set down is to sit, and such notice is to be

served not less than twelve days before the day for which such notice is given. (*Ord. 28th April, 1862.*)

This order is virtually repealed, as causes are now heard at the same time that the witnesses are examined upon the close of such examination, *Ord. 97, s. 1*; and notice of examination must be served at least fourteen days before the commencement of the examination term, *Ord. 56, s. 9.*

Notice of re-hearing must be served not less than seven days before the re-hearing term, *Ord. 92.*

#### LXXXVI.—RE-HEARING OF CAUSES.

1. There are to be four re-hearing terms in each year, commencing respectively as follows: (1.) The second Thursday in March. (2.) The first Thursday in June. (3.) The second Thursday in September. (4.) The first Thursday in December. (*Ord. 28th April, 1862.*)

2. All re-hearings of cases are to be in re-hearing term only.

Every re-hearing must be within six months after the decree is passed and entered, or within such further time as the court or any judge thereof may allow, *Ord. 96.*

As to re-hearings, see *Ord. 9, s. 17*; of causes in which the bill has been taken *pro confesso*, *Ord. 14, s. 8.*

The cause must be set down for re-hearing not less than ten days before the commencement of the term, and notice of the re-hearing must be served not less than seven days, *Ord. 92.*

The amount to be deposited with the registrar on any petition of re-hearing is £10, *Ord. 43, s. 7.*

In the case of a re-hearing, all parties interested in supporting the decree or order appealed from, are entitled to be heard, but no party, except the appellant, can be heard in support of the appeal, *Daniel's Chan. Pr. 1130.*

Any party not included as a co-petitioner in a petition of re-hearing, who is desirous of appearing, must present a separate petition, *Re Stephen*, 2 Phill. 562.

On a re-rehearing, all depositions taken before the original hearing, though not then made use of, may be read, *Daniel's Chan. Pr. 1130*; and the plaintiff may withdraw from the evidence any portion of the answer which may have been read in the court below, *Allfrey v. Allfrey*, 1 M. & G. 87.

Exhibits which were not in evidence at the original hearing may be produced upon a re-hearing; and an order to prove such exhibits *viva voce* at the hearing of the appeal may be obtained without notice, *Daniel's Chan. Pr. 1131.*

3. Applications in the nature of re-hearings to discharge or vary Orders made in Court, are to be made in re-hearing terms only, except with the leave of the Judge pronouncing the Order sought to be discharged or varied.

A re-hearing under this section must be within four months from the passing and entering of the order, *Ord.* 96.

#### LXXXVII.—APPEALS FROM ORDERS MADE IN CHAMBERS.

1. One judge will sit daily in each week for the despatch of business in Chambers. (*Ord.* 18th April, 1862.)

As to the business to be despatched in chambers, and the mode of procedure, see *Ord.* 34. Whatever applications can be made in chambers, must be so made, *Moffatt v. Ruddle*, 4 Grant 44.

2. Matters adjourned from Chambers under section third of Order thirty-four of the General Orders of the 3rd of June, 1853, and applications in the nature of re-hearings to discharge or vary orders made in Chambers, are to be heard in full Court on the last Wednesday of every month, except during examination terms.

3. The foregoing Orders are to come into operation on the twelfth day of May next. But causes may be set down and notices may be given of proceedings to be taken under the said Orders, from the day of the date hereof.

The orders referred to in this section are those from the 82nd to the 87th, both inclusive.

#### LXXXVIII.—READING DEPOSITIONS IN OTHER CAUSES.

Any party shall be entitled in future upon notice without order to use depositions taken in another suit in cases where under the present practice he is entitled to use such depositions upon obtaining the common order for that purpose. (*Ord.* 28th April, 1862.)

In order to read depositions taken in another suit, the parties must be the same as, or privy to the other suit, and the issue the same, *Lawrence v. Maule*, 28 L. J. Chan. 681; 7 W. R. 815; *Humphreys v. Pensam*, 1 M. &

O. 580; and see *Hope v. Liddell*, 21 Beav. 180; *Manby v. Bewicke*, 3 Jur. N. S. 685.

The parties may have been co-defendants in the suit the depositions in which are to be read, *Askew v. Poulterers' Co.*, 2 Ves. 89. The depositions of witnesses living may be used, *City of London v. Perkins*, 3 Bro P. C. 602.

#### LXXXIX.—EXAMINATION OF PARTIES.

Any party defendant may be examined as a witness without order, on behalf either of the plaintiff or of a co-defendant. Any party plaintiff may be examined as a witness without order, by a co-plaintiff, or by a defendant, in cases where under the present practice such examination may be had upon the common Order being obtained for that purpose. (*Ord. 28th April, 1862.*)

As to the examination of parties, see *Ord. 22.*

#### XC.—RE-TAXATION OF COSTS.

1. It shall be competent for any party against whom costs have been taxed by a deputy master of this Court, to obtain as of course an order for a re-taxation of the same before the taxing officer, of this Court at Toronto. (*Ord. 28th April, 1862.*)

2. It shall be the duty of the party obtaining such order to deposit with the Deputy-registrar and Master, with whom the papers are filed, a sufficient sum to cover the expenses of transmitting the same to Toronto, and of the return thereof.

3. In case less than one-twentieth be taxed off upon a re-taxation, the costs of such re-taxation shall be added to the bill already taxed.

Where more than one-twentieth is taxed off, the master has no power to allow any costs to the party obtaining such re-taxation.

4. This Order is to apply to bills of costs already taxed, as well as to bills that may be hereafter taxed, but it is not to apply to cases where the costs have been paid, or final proceedings have been taken upon the taxation



of costs already had ; process for the levying of such costs is not to be deemed a final proceeding within the meaning of this order.

### XCI.—PETITIONS UNDER ORDER IX, S. 18.

1. A petition filed under the eighteenth section of Order IX., of the General Orders of this Court of the 3rd June, 1853, is to be set down to be heard in Court in the paper of motions for decrees. And when it is ordered that any new party or any present party may answer the petition, and that the petitioner shall be at liberty to set down the petition again, it is to be set down in like manner, and upon the copy of such petition to serve is to be endorsed the following memorandum or notice, namely : " If you do not appear on the petition the court will make such order on the petitioner's own shewing as shall appear just," and upon the copy which is to be served of the order to answer such petition when the court shall deem it advisable to make such order is to be endorsed the following memorandum or notice, namely : " If you do not answer the petition the court will make such order on the petitioner's own shewing as shall be just in your absence. And if this order is served personally you will not receive any notice of the future proceedings on such petition." And when the party so served shall answer the petition the same is to be set down to be heard upon notice in the same paper. (*Ord. 9th May, 1862.*)

2. Petitions set down to be heard under the foregoing Order are to be set down not less than ten days before the day for which they are to be set down, and notice thereof when notice is required is to be served upon all proper parties not less than seven days before such day.

### XCII.—RE-HEARING—SETTING DOWN.

Causes are to be set down for re-hearing not less than ten days before the commencement of the re-hearing

term, for which they are so set down, and notice thereof is to be served upon all proper parties not less than seven days before such re-hearing term. (*Ord. 9th May, 1862.*)

### XCIII.—IRREGULAR PROCEEDINGS.

A notice of motion to set aside any proceeding for irregularity must specify clearly the irregularity complained of. (*Ord. 9th May, 1862.*)

### XCIV.—CAUSE LISTS.

The Registrar is to prepare a peremptory list of causes set down for hearing for each day on which they are to be heard, and for that purpose the party setting down a cause for hearing is to notify the Registrar of the day for which he has given notice of the hearing of such cause not less than seven days before the day for which such notice is given. (*Ord. 9th May, 1862.*)

### XCV.—REVIVOR.

1. Sections fifteen and sixteen of General Order number nine of the General Orders of this Court of the 3rd June, 1853, are hereby abrogated and discharged. (*Ord. 6th June, 1862.*)

2. Bills of revivor.—Bills of revivor and supplement, original bills in the nature of bills of revivor, and original bills in the nature of supplemental bills are abolished.

3. Upon any suit becoming abated by death, marriage, or otherwise, or defective by reason of some change or transmission of interest or inability, on the part of any plaintiff or defendant by devise, bequest, descent, or otherwise, it shall not be necessary to exhibit any bill of revivor or supplemental bill, or to proceed by any of the modes provided for by the sections of General Order by this Order rescinded in order to obtain an order to revive such suit or a decree or order to carry

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10 Dec 1865

on the proceedings, but an order to the effect of the order to revive, or of the usual supplemental decree under the former practice of this court may be obtained as of course upon precept upon an allegation contained in such precept, of the abatement of such suit, or of the same having become defective, and of the change or transmission of interest or liability. And an order so obtained when served upon the party or parties who would be defendant or defendants to a bill of revivor or supplemental bill according to the former practice of this Court shall, from the time of such service be binding upon such party or parties in the same manner in every respect as if such order had been regularly obtained according to such former practice of the Court, and such party or parties shall thereupon become thenceforth a party or parties to the suit, provided that it shall be open to the party or parties so served within fourteen days after the service of such order to apply to the Court by motion on petition to discharge such order on any ground which would have been open to him or them on a bill of revivor or supplemental bill, stating the previous proceedings in the suit, and the alleged change or transmission of interest or liability, and praying the usual relief consequent thereon; provided also, that if any party so served shall be under any disability other than coverture, such order shall be of no force or effect as against such party, until a guardian or guardians *ad litem* shall have been duly appointed for such party, and the period of fourteen days shall have lapsed thereafter.

## XCVI.—RE-HEARINGS.

From and after the first day of April next, all re-hearings of causes are to be within six months after the decree or decretal order shall have been passed and entered; and applications in the nature of re-hearings to discharge or vary orders made in Court, not being decretal orders, are to be within four months from the

passing and entering of the same ; or within such further time as the Court or any judge thereof may allow upon special grounds therefor, shewn to the satisfaction of the Court or judge. (*Ord. 1, 10th Jany, 1863.*)

As to re-hearings, see *Ord. 9, s. 17; Ord. 14, s. 8; Ord. 86; Ord. 92.*

#### XCVII.—HEARINGS.

1. Causes are to be heard at the same time that the witnesses are examined upon the close of such examination. No evidence to be used on the hearing of a cause is to be taken before any examiner or officer of the Court, unless by the order first had of the Court or a judge thereof, upon special grounds adduced for that purpose. (*Ord. 2, 10th Jany, 1863.*)

For the towns at which witnesses may be examined and causes heard, see *Ord. 56, s. 4.*

Causes may by consent of parties be brought to a hearing on affidavit evidence, *Ord. 20, s. 4.*

2. When the examination of witnesses before a judge is to be had in any town or place, other than that in which the pleadings in the causes are filed, it shall be the duty of the party setting down the cause for such examination, to deliver to the Registrar or Deputy-registrar with whom the pleadings are filed, a sufficient time before the day fixed for such examination, a præcipe requiring him to transmit to the Registrar or Deputy-registrar, at the place where such examination of witnesses is to be had, the pleadings in the cause ; and at the same time to deposit with him a sufficient sum to cover the expense of transmitting and re-transmitting such pleadings, and thereupon it shall be the duty of such Registrar or Deputy-registrar forthwith to transmit the pleadings accordingly. (*Ord. 3, 10th Jany, 1863.*)

As to the mode in which papers are to be transmitted, see *Ord. 43, s. 5.*

3. The fee payable to the Deputy-registrars for setting down causes under the foregoing order is to be two pounds.

**XCVIII.—DECREES FOR REDEMPTION OR FORECLOSURE  
OF MORTGAGES, OR FOR SALE.**

1. When the time for answering in either of the above classes of cases has elapsed, on production to the Registrar of the Court, of the affidavit of the service of the bill, and upon præcipe, the plaintiff is to be entitled to such a decree as would, under the present practice, be made by the Court, upon a hearing of a cause *pro confesso*, under an order obtained for that purpose; and on every such bill is to be endorsed the following notice:—  
“Your answer is to be filed at the office of the Registrar, at Osgoode Hall, in the city of Toronto, (or when the bill is filed in an outer county, at the office of the Deputy-registrar at——.) You are to answer or demur within four weeks from the service hereof, (or when the defendant is served out of the jurisdiction, within the time limited by the order authorising the service.) If you fail to answer or demur within the time above limited, you are to be subject to have a decree or order made against you forthwith thereafter; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause. *Note.*—This bill is filed by Messrs. A. B. and C. D., of the city of Toronto, in the county of York, solicitors for the above named plaintiff, (and when the party who files the bill is agent, add agents of Messrs. E. F. and G. H., of ——, solicitors for the above plaintiff.) And upon bills for foreclosure or sale is to be added to such notice the following; ‘And take notice that the plaintiff claims that there is now due by you for principal money and interest the sum of ——, and that you are liable to be charged with this sum, with subsequent interest and costs, in and by the decree to be drawn up, and that in default of payment thereof within six calendar months from the time of drawing up the decree, your interest in the property may be foreclosed

*also offic  
Bill: O.  
ap<sup>t</sup> 1. 1867*

*see O. 9. 186  
20 Dec. 1865*

[or sold] unless before the time allowed you as by this notice for answering you file in the office above named a memorandum in writing signed by yourself or your solicitor, to the following effect: '*I dispute the amount claimed by the plaintiff in the cause,*' in which case you will be notified of the time fixed for settling the amount due by you at least four days before the time to be so fixed." (Ord. 4, 10th Jan., 1863.)

2. This Order is not to affect any suit now pending.

#### XCIX.—ADDRESS OF BILLS AND PETITIONS.

After the first day of February next, all bills of complaint and petitions are to be addressed, "To the Honourable the Judges of the Court of Chancery." (Ord. 5, 10th Jan., 1863.)

Before this order, bills of complaint and petitions were addressed to the Chancellor only, Ord. 9, s. 1.

#### C.—AUTHENTICATION OF WRITS.

The signature of a Judge shall not be necessary to the authentication of any writ. (Ord. 6, 10th Jan., 1863.)

#### CI.—SERVICE OUT OF JURISDICTION.

The time within which any defendant served out of the jurisdiction of this Court with an office copy of a bill of complaint shall be required to answer the same, or to demur thereto, to be as follows: (Ord. 7, 10th Jan., 1863.)

1. If the defendant be served in the United States of America, in any city, town, or village within ten miles from Lake Huron, the River St. Clair, Lake St. Clair, the River Detroit, Lake Erie, the River Niagara, Lake Ontario, or the River St. Lawrence, or in any part of Lower Canada not below Quebec, he is to answer or demur within six weeks after such service.

2. If served within any State of the United States not within the limits above described other than Florida,



Texas, or California, he is to answer or demur within eight weeks after such service.

3. If served within any part of Lower Canada below Quebec, or in Nova Scotia, New Brunswick, or Prince Edward Island, he is to answer or demur within eight weeks after such service.

4. If served within any part of the United Kingdom, or of the Island of Newfoundland, he is to answer or demur within ten weeks from such service.

5. If served elsewhere than within the limits above designated, he is to answer or demur within six calendar months after such service.

6. The time within which any party served with any petition, notice, or other proceeding other than a bill of complaint, is to answer or appear to the same, is to be the same time as prescribed for answering or demurring to a bill of complaint, according to the locality of service.

7. Any party may apply to the court to prescribe a shorter time than is hereinbefore provided for any other party to answer or demur to a bill of complaint, or to answer or appear to any petition, notice, or other proceeding.

8. Any party may apply for leave to serve any other party out of the jurisdiction under the General Orders of this Court of June, 1853.

For the mode of obtaining an order for service out of the jurisdiction and the evidence in support of the application for such order, see *Ord.* 9, 4, 5, and notes.

9. Affidavits of service under this Order and of the identity of the party served, may be sworn as follows: If such service be effected in any place not within the dominions of the Crown before the mayor or other chief magistrate of any city, town or borough, in or near which such service may be effected, or before any British consul or vice-consul, or the judge of any court of superior juris-



diction. And if such service be effected in any place within the dominions of the Crown, not within the jurisdiction of this Court, such affidavit may be sworn before any the like officer, or any notary public, and in Lower Canada, before any commissioner for taking affidavits appointed under any statute of this province. And such affidavit shall be deemed sufficient proof of such service and identity without proof of the official character, or of the handwriting of the person administering the oath upon such affidavit.

As to the evidence of identity necessary, see *Ord. 13, s. 2*, and notes.

YORK UNIVERSITY LIBRARY

# SCHEDULES TO ORDERS OF 1853.

## SCHEDULE A.

### FORM OF BILLS.

1. By a legal or equitable mortgagee, or person entitled to a lien as a security for a debt, seeking foreclosure or sale, or otherwise to enforce his security.

IN CHANCERY.

A. B.	}	<i>(enumerate all the parties plaintiffs) . . . . .</i>	Plaintiffs.
and C. D.			
and E. F.	}	<i>(all parties defendants). . . . . .</i>	Defendants.
and G. H.			

CITY OF TORONTO,  
(or the county town se-  
lected for the examina-  
tion of the witnesses).

To THE HONORABLE, &c.

Humbly complaining, shows, &c.

A. B. of &c., that under and by virtue of an indenture (or other document) dated, &c. and made, &c., (and a transfer thereof, made by indenture, dated, &c. and made, &c.) the said A. B. is a mortgagee (or, an equitable mortgagee) of (or, is entitled to hold a lien upon) certain freehold property (or leasehold, or other property, as the case may be) therein comprised, being, (insert a general description of the property) for securing the sum of £ ——— and interest; that the time for payment thereof has elapsed; that £ ——— has been paid on account of principal, and £ ——— on account of interest (or, that no sum has been paid on account of either principal or interest); that your orators have not been in the occupation of the premises, or any part thereof (or, that your orators have been in the occupation of the premises, or of some part thereof, from the ——— day of ——— in the year ——— to the ——— day of ——— in the year ———); that there is now justly due upon the said security, for principal, £ ——— and for interest £ ———. That E. F. and G. H., the defendants hereto, are entitled to the equity of redemption of the said mortgaged premises (or, the premises subject to such lien). Your orators therefore pray that they may be paid the said sum of £ ——— and interest, and the costs of this suit; and in default thereof that the equity of redemption of the said mortgaged premises may be foreclosed, (or, that the said mortgaged premises may be sold, or that the premises subject to such lien may be

*sold, as the case may be, and the produce thereof applied in or towards the payment of the said debt and costs, and that the said E. F. and G. H. may be ordered to pay the balance of the said mortgage debt and costs, after deducting the amount realized by such sale,) and for that purpose all proper directions may be given and accounts taken (and for further relief).*

2. By a judgment creditor, who has registered his judgment, seeking a sale, or otherwise to enforce his charge or lien.

## IN CHANCERY.

A. B. .... Plaintiff.

and

C. D. .... Defendant.

CITY OF TORONTO,  
(or the county town selected for the examination of the witnesses.)

TO THE HONORABLE, &c.

Humbly complaining, &c. your orator, &c.  
&c. that in \_\_\_\_\_ term, in the year \_\_\_\_\_ your orator, or G. H., late of \_\_\_\_\_ deceased, of whom your orator is the executor, or administrator, or assignee, under an assignment, dated, &c. and made, &c. or of whose executor or administrator, de bonis non, your orator is the assignee under, &c.) recovered judgment in the court of \_\_\_\_\_ against C. D., the defendant herein named, for the sum of £ \_\_\_\_\_, in an action theretofore brought by your orator against the said C. D., which judgment was duly registered in the registry of the county of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, at which time the said C. D. had divers lands, tenements and hereditaments in the said county, and that the said C. D. is now the owner of the same lands, tenements and hereditaments, subject to the said judgments. Your orator therefore prays that he may be paid the amount of the said judgment, together with his interest thereon, and his costs of this suit, or in default thereof that the said lands, tenements and hereditaments, or a competent part thereof, may be sold for the satisfaction thereof, and the proceeds of such sale applied accordingly; and for that purpose that all proper directions be given and accounts taken.

3. By a person entitled to the redemption of any legal or equitable mortgage, or any lien, seeking to redeem the same.

## IN CHANCERY.

A. B. .... Plaintiff.

and

C. D. .... Defendant.

CITY OF TORONTO,  
(or the county town selected by the plaintiff for the examination of the witnesses.)

TO THE HONORABLE, &c.

Humbly complaining, &c. your orator, &c. that under and by virtue of an indenture (or other document) dated the \_\_\_\_\_ day of \_\_\_\_\_ and made between [parties] [and the assurances hereinafter mentioned—that is to say, an indenture dated the \_\_\_\_\_

day of \_\_\_\_\_ the will of \_\_\_\_\_ dated the \_\_\_\_\_ day of \_\_\_\_\_] your orator is entitled to the equity of redemption of certain freehold property [or leasehold, or other property, as the case may be] therein comprised, being [here describe the property shortly] which was originally mortgaged [or pledged] for securing the sum of £ \_\_\_\_\_ and interest; and that C. D., the defendant hereinafter named, is now, by virtue of the said indenture, dated the \_\_\_\_\_ day of \_\_\_\_\_ [and of subsequent assurances], the mortgagee of the said property [or holder of the said lien], and entitled to the principal money and interest remaining due upon the mortgage [or lien]; and your orator believes that the amount of the principal money and interest now due upon the said mortgage [or lien] is the sum of £ \_\_\_\_\_, or thereabouts; and he has made, or caused to be made, an application to the said C. D. to receive the said sum of £ \_\_\_\_\_, and any costs justly payable to him, and to reconvey to your orator the said mortgaged property [or property subject to the said lien] upon payment thereof, and of any costs due to him in respect of this security, but that the said C. D. has not so done. Your orator therefore prays that he may be let in to redeem the said mortgaged property [or property subject to the said lien], and that the same may be reconveyed [or delivered up] to him, upon payment of the principal money and interest, and costs due and owing upon the said mortgage [or lien]; and for that purpose that all proper directions may be given and accounts taken.

4. By a person entitled to an account of the dealings and transactions of a partnership desolved or expired, seeking such account.

## IN CHANCERY.

A. B. .... Plaintiff.

and

C. D. .... Defendant.

CITY OF TORONTO,  
(or the county town selected for the examination of the witnesses.)

TO THE HONORABLE &c.

} Humbly complaining, &c. your orator,  
&c. that from the \_\_\_\_\_ day of \_\_\_\_\_  
down to the \_\_\_\_\_ day of \_\_\_\_\_ he and C. D. the defendant hereinafter named, carried on the business of \_\_\_\_\_ in co-partnership, under certain articles of co partnership, dated the \_\_\_\_\_ day of \_\_\_\_\_ and made between [parties], [or under a verbal agreement made between your orator and C. D., or through their respective agents E. F. and G. H.] on the \_\_\_\_\_ day of \_\_\_\_\_; and he says that the said co-partnership was dissolved [or expired, as the case may be] on the \_\_\_\_\_ day of \_\_\_\_\_. Your orator therefore prays that an account of the partnership dealings and transactions between your orator and the said C. D. may be taken, and the affairs and business of the said partnership wound up and settled under the direction of this court, and for that purpose that all proper directions may be given, and accounts taken.

## 5. For dissolution of a co-partnership.

IN CHANCERY.

A. B. .... Plaintiff.

and

C. D. .... Defendant.

CITY OF TORONTO,  
[or the county town se-  
lected for the examina-  
tion of the witnesses.]

TO THE HONORABLE, &amp;c.

Humbly complaining, &c. your orator, &c,  
that your orator and C. D., the defendant  
hereinafter named, are and have been,  
since the \_\_\_\_\_ day of \_\_\_\_\_ co-partners in the trade or busi-  
ness of \_\_\_\_\_ under certain articles of co-partnership, dated, &c. \_\_\_\_\_  
[or under a verbal agreement made between them, on the \_\_\_\_\_ day  
of \_\_\_\_\_], which partnership was to continue for \_\_\_\_\_ years,  
[or for an indefinite time]; that the said business was carried on under  
the said agreement until \_\_\_\_\_ without any difficulty [*here state the  
facts relied on as warranting dissolution, as*] that from the last mention-  
ed day, until the present time, the said C. D. has greatly misconducted him-  
self in the said business, by removing the books of the co-partnership  
from the shop or counting-house of the said firm, and denying your orator  
or debarring him from, access thereto; by discharging the clerks and ser-  
vants of the said firm, and engaging others in his own interest in their  
room; by making false entries in the said books, or improperly keeping the  
same; all which was done with the view and has had the effect of exclud-  
ing your orator from his due share in the management of the said business;  
by using the name of the firm for his own private purposes, and applying  
the moneys of the partnership to his own individual use: that there is,  
nothing in the said articles, or in the said agreement, to justify such con-  
duct; and your orator has made frequent applications to the said C. D. to  
desist therefrom, and to act in accordance with the said agreement and with  
his duty as a partner, but without effect; on which account your orator, on  
the \_\_\_\_\_ day of \_\_\_\_\_ gave notice to the said defendant that  
the said partnership should be dissolved from the \_\_\_\_\_ day of \_\_\_\_\_.  
Your orator therefore prays that the said partnership may be dissolved,  
and that the accounts of the said business may be taken from the com-  
mencement thereof, and the affairs thereof wound up and adjusted, and  
that your orator may have [*such further relief, &c.*]

6. Bill by a person entitled to the specific performance of an agree-  
ment for the sale or purchase of any property, seeking such specific  
relief.

IN CHANCERY.

A. B. .... Plaintiff.

and

C. D. .... Defendant.

CITY OF TORONTO,  
[or the county town se-  
lected for the examina-  
tion of the witnesses.]

TO THE HONORABLE, &amp;c.

Humbly complaining, &c. your orator,  
&c. that by an agreement, dated the \_\_\_\_\_  
day of \_\_\_\_\_ and signed by C. D.,

the defendant hereinafter named, the said C. D. contracted to buy of your orator [or to sell to him] certain freehold property [or leasehold, or other property as the case may be], therein described or referred to, for the sum of £ ———; and that he has made or caused to be made to the said C. D. an application specifically to perform the said agreement on his part, but that he has not done so. Your orator therefore prays that the said agreement may be specifically performed, and for that purpose all proper directions may be given, he the said A. B. hereby offering to perform the said agreement specifically on his part.

7. Bill for the specific performance of a parcel agreement partly performed.

## IN CHANCERY.

A. B. .... Plaintiff.

and

C. D. .... Defendant.

CITY OF TORONTO,  
[or the county town selected for the examination of the witnesses.]

TO THE HONORABLE, &c.

Humbly complaining, &c. your orator, &c. that on the ——— day of ——— your orator being seized in fee simple possession [or C. D., the defendant hereinafter mentioned, being or pretending to be seized in fee simple in possession, or in fee tail, or for years, or in remainder expectant upon the determination of a certain estate for the life, &c. as the case may be] of lot number ———, your orator and the said C. D. entered into a verbal agreement for the sale and purchase of the said premises, at or for the price or sum of £ ——— payable by equal annual instalments, with interest, upon the payment whereof a proper conveyance was to be executed of the said premises, free from incumbrances: [here state acts of part performance, as] that your orator, or the said C. D. was accordingly admitted, and entered into possession of the said lot, and has continued in possession thereof ever since, and is still in possession thereof, and has made divers and considerable improvements thereon, and has paid the sum of £ ——— part of the said purchase money; and your orator submits that under the circumstances aforesaid the said agreement has been partly performed, so as to entitle your orator to a specific execution thereof; for which purpose your orator has made frequent applications to the said C. D., but without effect. Your orator therefore prays that the said contract may be specifically performed by the said C. D., your orator being ready and willing and hereby offering to perform the same in all respects on his part, and that your orator may have such further and other relief, &c.

orator,

C. D.,

## 8. Bill to stay waste.

IN CHANCERY.

A. B. .... Plaintiff.

and

C. D. .... Defendant.

CITY OF TORONTO,\*  
 [or the county town se-  
 lected for the examina-  
 tion of the witnesses.]

TO THE HONORABLE, &amp;c.

Humbly complaining, &c. your orator, &c. that your orator is and has been, from before the acts hereinafter complained of until the present time, seized in fee simple [or in tail, or for life in possession, or remainder expectant upon the determination of an estate for the life of, &c., under and by virtue of an indenture of settlement, dated, &c., or possessed for the remainder of a term of \_\_\_\_\_ years, under and by virtue of an indenture of demise, dated, &c., and made, &c.] of lot number \_\_\_\_\_; and C. D., the defendant hereinafter named, is in possession of the said lot, as tenant, for a term of \_\_\_\_\_ years [or from year to year, or at will] of your orator, under and by virtue of an indenture of demise [or an agreement dated, &c. and made, &c.] between your orator, (or, E. F. deceased, whose estate has come to your orator by descent, or devise, or purchase, or under and by virtue of his last will, dated, &c.) and the said C. D. [or G. H., whose estate has come to the said C. D. by operation of law, as executor, or administrator, or assignee in bankruptcy or insolvency of the said G. H., or by devise or purchase, under and by virtue of the will of the said G. H., or an indenture of assignment, dated, &c. or as tenant for life, impeachable for waste, under and by virtue of the aforesaid indenture of settlement] has, since the \_\_\_\_\_ day of \_\_\_\_\_ committed waste on the said lot, by cutting down and removing from the said lot, and applying to his own use, a large number of the timber and other trees standing, growing and being thereon, and quarrying a large quantity of stone, being on and part of the said lot, and by pulling down, &c., houses, &c., and he continues and threatens and intends to continue to commit such waste as aforesaid, and other waste and destruction on the said lot, although frequently requested by your orator to desist therefrom. Your orator therefore prays that the said C. D. may be restrained by the order and injunction of this honorable court from committing such waste as aforesaid, or any other waste, spoil, or destruction on the said premises, and may account, &c., and that your orator may have such further and other relief in the premises.

## 9. Bill to stay trespass in the nature of waste.

IN CHANCERY.

A. B. .... Plaintiff.

and

C. D. .... Defendant.

CITY OF TORONTO,  
 (or the county town se-  
 lected for the examina-  
 tion of witnesses.)

TO THE HONORABLE, &amp;c.

Humbly complaining, &c., your orator, &c., that your orator was at the time of the acts hereinafter complained of, and has been since



up to the present time, the owner in fee simple (or *seised in tail, or for life, or possessed for the remainder of a term of years, under and by virtue of an indenture, dated, &c., and made, &c., as the case may be*) and in possession of lot number \_\_\_\_\_ and that A. B., the defendant hereinafter named, has, from the \_\_\_\_\_ day of \_\_\_\_\_ until the present time, continually trespassed on the said lot, by cutting down and removing from the said lot, and applying to his own use, divers valuable timber and other trees which were growing, standing and being on the said lot (*by quarrying and removing from the said lot and applying to his own use large quantities of stone which were on part of the said lot*), and he continues and threatens and intends to continue to trespass on the said lot, in like manner, although frequently requested by your orator to desist therefrom. Your orator therefore prays that the said defendant may be restrained by the injunction of this honorable court from committing the acts aforesaid, and other acts of a like nature, and may account for the value of the timber and other trees cut down [*or stone quarried*], removed and applied to his own use as aforesaid, and that your orator may have such further and other relief as may seem meet.

10. Bill by a person entitled to an equitable estate or interest and claiming to use the name of his trustee in prosecuting an action for his sole benefit.

## IN CHANCERY.

A. B. ....Plaintiff.

and

C. D. ....Defendant.

CITY OF TORONTO,  
[or the county town selected for the examination of the witnesses.]

TO THE HONORABLE, &c.

Humbly complaining, &c., your orator, &c., that under an indenture, dated the \_\_\_\_\_ day of \_\_\_\_\_ and made between [*parties*], he is entitled to an equitable estate or interest in certain property therein described or referred to; and that C. D., the defendant hereinafter named, is a trustee for him of such property; and that being desirous to prosecute an action at law against \_\_\_\_\_ in respect of such property, he has made, or caused to be made, an application to the said defendant to allow him to bring such action in his name, and has offered to indemnify him against the costs of such action, but that the said defendant has refused or neglected to allow his name to be used for that purpose. You orator therefore prays that the said A. B. may be allowed to prosecute the said action in the name of the said defendant, he hereby offering to indemnify him against the cost of such action

11. Bill by a person entitled to have a new trustee appointed in a case where there is no power in the instrument creating the trust to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee.

## IN CHANCERY.

A. B. .... Plaintiff  
and  
C. D. .... Defendant

CITY OF TORONTO,  
[or the county town se-  
lected for the examina-  
tion of the witnesses.]

TO THE HONORABLE, &c.

Humbly complaining, &c., your orator, &c.,  
that under an indenture, dated the \_\_\_\_\_  
day of \_\_\_\_\_ and made between [par-  
ties, or will of \_\_\_\_\_, or other document, as the case may be], your  
orator is interested in certain trust property therein mentioned or referred  
to; and that C. D., the defendant hereinafter mentioned, is the present  
trustee of such property [or, is the real or personal representative of the  
last surviving trustee of such property, as the case may be]; and that there  
is no power in the said indenture [or will, or other document] to appoint  
new trustees [or that the power in said indenture, or other document, to  
appoint new trustees cannot be exercised]. Your orator therefore prays  
that new trustees may be appointed of the said trust property, in the  
place of, &c. [or to act in conjunction with] the said C. D.

## SCHEDULE B.

## FORM OF ENDORSEMENT ON BILL OF COMPLAINT.

Your answer is to be filed at the office of the registrar, at Osgoode Hall,  
in the city of Toronto, (or, when the bill is filed in an outer county, at the  
office of the deputy registrar at \_\_\_\_\_.)

You are to answer or demur within four weeks from the service hereof,  
(or, when the defendant is served out of the jurisdiction, within the time lim-  
ited by the order authorising the service.)

If you fail to answer or demur within the time above limited, you are to  
be subject to have such decree or order made against you as the court may  
think just, upon the plaintiff's own shewing; and, if this notice is served  
upon you personally, you will not be entitled to any further notice of the  
future proceedings in the cause.

NOTE.—This bill is filed by Messrs. A. B. and C. D., of the city of Tor-  
onto, in the county of York, solicitors for the above named plaintiff; (and,  
where the party who files the bill is agent, add, agents of Messrs. E. F. and  
G. H., of \_\_\_\_\_, solicitors for the above named plaintiff).

Where the plaintiff sues in person, his place of residence is to be stated;  
and where that is more than three miles from the office where the bill is  
filed, an address for service must be designated, in accordance with the pro-  
visions of section 8, order XLIII.

## SCHEDULE C.

FORM OF AFFIDAVIT OF THE SERVICE OF AN OFFICE COPY  
OF A BILL

IN CHANCERY.

Between A. B. .... Plaintiff  
and

C. D. and E. F. .... Defendants.

I, G. H. of \_\_\_\_\_, in the county of \_\_\_\_\_ yeoman, make oath and say (*when the affidavit is made by several deponents it is to commence, We,*

G. H. of \_\_\_\_\_, in the county of \_\_\_\_\_, yeoman, and J. K., of \_\_\_\_\_, in the county of \_\_\_\_\_, gentleman, make oath and say; and first, I, G. H., for myself, make oath and say, that I did on the \_\_\_\_\_ day of \_\_\_\_\_, personally serve the above named defendant C. D. with a paper which purported to be an office copy of the bill filed in this cause, by delivering to and leaving with the said defendant C. D., (*if served otherwise than personally, say, with a grown up person, (or as the case may be,) at the dwelling house of the said defendant C. D.,*) the said office copy. I further say that upon the said office copy there was a certificate to the effect that the original bill in this cause had been filed at Osgoode Hall in the city of Toronto, on the \_\_\_\_\_ day of \_\_\_\_\_, which certificate purported to be signed by A. G., registrar of the court, (*where the bill has been filed in an outer county state the fact accordingly,*) and that each page of the said office copy was sealed with a seal similar to the one which I now look upon in the margin of this affidavit. I further say that upon the said office copy, at the time of the service thereof, there was endorsed the following memorandum—to wit, (*here insert the endorsement set out in the preceeding schedule.*

## SCHEDULE D.

## NOTICE IN CASE OF AN ABSCONDING DEFENDANT.

To the order directing publication the following notice is to be added:—

C. D.: take notice that if you do not answer or demur to the bill pursuant to the above order, the plaintiff may obtain an order to take the bill as confessed against you, and the court may grant such relief as he may be entitled to on his own shewing, and you will not receive any further notice of the future proceedings in the cause.

## SCHEDULE E.

## FORM OF AN ANSWER.

IN CHANCERY.

A. B. .... Plaintiff.  
and

C. D. and E. F. .... Defendants.

The answer of C. D., one of the above named defendants, to the bill of complaint of A. B., the above named plaintiff.

"In answer to the said bill I, C. D., say as follows:"

"I believe that the defendant E. F. does claim to have a charge upon the farm and premises comprised in the indenture of mortgage of the ——— day of ———, in the plaintiff's bill mentioned.

"Such charge was created by an indenture dated &c., made between myself of the one part, &c.

"To the best of my knowledge, remembrance and belief, there is not any other mortgage, charge, or incumbrance affecting the aforesaid premises.

Such statements as are considered necessary or material are to be introduced with as much brevity as may consist with clearness; and where a defendant seeks relief under section 4 of order XII. the answer is to ask the special relief to which he thinks himself entitled.

#### ENDORSEMENT.

This answer is filed by Messrs A. B. and C. D., of the city of Toronto, in the county of York, solicitors for the above named defendants (*and, where the party who filed the answer is agent, add, agents of Messrs. E. F. and G. H., of ———, solicitors for the above named defendants.*)

Where the party defends in person the answer must be endorsed, in conformity with the 8d section of order XLIII.

#### FORM OF JURAT TO ANSWER.

The defendant C. D. on the ——— day of ———, appeared before me at my chambers in ———, and signed the foregoing answer in my presence, and thereupon was sworn before me that he had read the said answer and knew the contents thereof, and that the same was true of his own knowledge, except as to matters which are therein stated to be on his information and belief, and as to those matters he believed it to be true.

#### IN THE CASE OF AN ILLITERATE PERSON.

The defendant C. D., not being able to read or write, E. F., solicitor (*or clerk to the solicitor*) for the said defendant, was sworn before me at my chambers in ———, on the ——— day of ———, that he had truly and faithfully read the contents of this answer to the said C. D., and that he appeared perfectly to understand the same; and the said C. D. was thereupon sworn that he heard the said answer subscribed by him with his mark read over to him by the said E. F., and that he knew the contents thereof, and that the same was true of his own knowledge, except as to matters which are therein stated to be on his information, and as to those matters he believes it to be true.

#### SCHEDULE G.

##### NOTICE IN CASE OF AN ABSENT DEFENDANT.

#### IN CHANCERY.

A. B. ....Plaintiff.

and

C. D. ....Defendant.

To the Defendant C. D.,

Take notice, that a motion will be made to the court, on the ——— day of ———, (*the time fixed by the order authorising publication.*)

that the bill in this cause may be taken as confessed against you; and such order having been made, the court may grant to the plaintiff such relief as he may be entitled to on his own shewing; and you will not receive any further notice of the future proceedings in the cause.

### SCHEDULE H.

#### NOTICE OF MOTION FOR THE ADMINISTRATION OF THE ESTATE OF A DECEASED PERSON.

IN CHANCERY.

In the matter of the estate of John Thomas, late of the township of \_\_\_\_\_, in the county of \_\_\_\_\_, deceased.

Joseph Wilson  
against  
William Cochran.

To William Cochran, executor of John Thomas, deceased.

Take notice, that Joseph Wilson, of the city of Toronto, in the county of York, Esquire, (or other proper description of the party,) who claims to be a creditor upon the estate of the above named John Thomas, will apply to one of the judges of the Court of Chancery, at Osyoode Hall, in the city of Toronto, on the \_\_\_\_\_ day of \_\_\_\_\_, at the hour of noon, for an order for the administration of the estate real and personal of the said John Thomas, by the Court of Chancery.

NOTE: If you, the above named William Cochran, do not attend, either in person or by your solicitor, at the time and place above mentioned, such order will be made in your absence as the judge may think just and expedient.

A. D.,

Of the city of Toronto, solicitor for the above named Joseph Wilson.

### SCHEDULE I.

#### FORM OF REPLICATION.

IN CHANCERY.

A. B. .... Plaintiff.

and

C. D., E. F., and G. H. .... Defendants.

The plaintiff in this cause joins issue with the defendants E. D., (all the defendants who have answered,) and will hear the cause upon bill and answer against the defendant E. F., (all defendants against whom the cause is to be heard upon bill and answer,) and on the order to take the bill *pro confesso* against the defendant G. H., (as the case may be.)

## SCHEDULE K.

FORM OF AFFIDAVIT AS TO PRODUCTION OF DOCUMENTS  
UNDER ORDER XX.

IN CHANCERY.

Between &amp;c.

I \_\_\_\_\_, of \_\_\_\_\_ make oath and say as follows :

- (1). I say I have in my possession or power the documents relating to the matters in question in this suit, set forth in the first and second parts of the first schedule hereto annexed.
- (2). I further say, that I object to produce the said documents set forth in the second part of the said first schedule hereto.
- (3). I further say,  
(*State upon what grounds the objection is made, and verify the facts so far as may be.*)
- (4). I further say, that I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit, set forth in the second schedule hereto annexed.
- (5). I further say, that the last mentioned documents were last in my possession or power on (*state when.*)
- (6.) I further say,  
(*State what has become of the last mentioned documents, and in whose possession they now are.*)
- (7). I further say, according to the best of my knowledge, remembrance, information and belief, that I have not now, and never have had, in my own possession, custody or power, or in the possession, custody or power of my solicitors or agents, or solicitor or agent, or in the possession, custody or power of any other person on my behalf, any deed, account, book of account, voucher, receipt, letter, memorandum, paper or writing, or any copy of, or extract from, any such document, or any other document whatsoever, relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the first and second schedules hereto.

NOTE 1.—(*If the party denies having any, he is to make an affidavit in form of the seventh paragraph, omitting the exception.*)

NOTE 2.—(*This form of affidavit, though not obligatory, will be satisfactory.*)

## SCHEDULE L.

## FORM OF NOTICE OF HEARING.

IN CHANCERY.

A. B. ....Plaintiff  
and

C. D. ....Defendant.

TO THE ABOVE DEFENDANT, C. D.

Take notice that this cause has been set down to be heard on the

\_\_\_\_\_ day of \_\_\_\_\_; and unless you attend at the time and place appointed, a decree may be pronounced in your absence.

O. H., Solicitor for the plaintiff

(or as the case may be.)

#### SCHEDULE M.

#### FORM OF APPOINTMENT.

IN CHANCERY.

A. B., ..... Plaintiff.

and

C. D., ..... Defendant.

I hereby appoint the \_\_\_\_\_ day of \_\_\_\_\_ to proceed (*here state the nature of the business for which the appointment is made*), when all parties are to attend at chambers in Osgeode Hall, in the city of Toronto, at the hour of noon,

(*to be signed by judge.*)

NOTE.—If you do not attend either in person or by your solicitor, at the time and place above mentioned, such order will be made and proceedings taken in your absence, as the judge may think just and expedient.

G. H., Solicitor for

#### SCHEDULE N.

#### NOTICE TO BE ENDORSED ON AN OFFICE COPY OF A DECREE UNDER RULE XXXIV. SECTION 6.

To Mr. \_\_\_\_\_, the person upon whom service has been directed.

(*set out the order.*)

If you wish to apply to discharge the foregoing order, or to add to or vary the decree, you must do so within fourteen days from the service hereof. (*When the order fixes a time for the further proceedings, add*) And if you fail to attend at the time and place appointed, either in person or by your solicitor, such order will be made and proceedings taken in your absence, as the judge may think just and expedient; and you will be bound by the decree and the further proceedings in the cause in the same manner as if you had been originally made a party to the suit, without any further notice.

#### SCHEDULE O.

#### CONDITIONS OF SALE.

1st. No person shall advance less than £2 at any bidding under £100, nor less than £5 at any bidding over £100, and no person shall retract his bidding.

2nd. The highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

3rd. The parties to the suit, with the exception of the vendor, are to be at liberty to bid.

4th. The purchaser shall, at the time of sale, pay down a deposit in the



proportion of £10 for every £100 of his purchase money to the vendor or his solicitors, and shall pay the remainder of the purchase money on the \_\_\_\_\_ day of \_\_\_\_\_ next; and upon such payment the purchaser shall be entitled to the conveyance, and to be let into possession \_\_\_\_\_; the purchaser, at the time of such sale, to sign an agreement for the completion of the purchase.

5th. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6th. If the purchaser shall fail to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon shall be forfeited, and the premises may be re-sold; and the deficiency, if any, by such re-sale, together with all charges attending the same or occasioned by the defaulter, shall be made good by the defaulter.

#### SCHEDULE P.

##### JURAT OF AFFIDAVIT.

Sworn before me, at \_\_\_\_\_, on the \_\_\_\_\_, having been first read over to the deponent C. D., whom I informed that he was liable to cross examination as to its contents, and that he was at liberty to add to or vary the same.

\_\_\_\_\_  
Signature of Officer.

#### SCHEDULE Q.

The court doth order that the following accounts and enquiries be taken and made, that is to say:

1st. An account of the personal estate not specifically bequeathed of A. B. deceased, the testator in the pleadings mentioned come to the hands of, &c.

2nd. An account of the said testator's debts.

3rd. An account of the said testator's funeral expenses.

4th. An account of the said testator's legacies.

5th. An enquiry, what parts, if any, of the said testator's personal estate are outstanding or undisposed of.

And it is ordered that the said testator's personal estate, not specifically bequeathed, be applied in payment of his debts and funeral expenses in a due course of administration, and then, in payment of his legacies.

And it is ordered that the following further accounts and enquiries be taken and made, that is to say:

6th. An enquiry what real estate the said testator was [seised of or entitled to at the time of his death.

7th. An enquiry what incumbrances affect the said testator's real estate.

8th. An account of the rents and profits of the said testator's real estate received by, &c.

And it is ordered that the said testator's real estate be sold. And it is ordered that the further consideration of this case be adjourned, and any of the parties are to be at liberty to apply.

## CON. STAT. U. C. CAP. XIII.

AN ACT RESPECTING THE COURT OF  
ERROR AND APPEAL.

IX. The Court shall have an appellate Civil and Criminal Jurisdiction throughout Upper Canada, and an appeal shall lie thereto from all judgments of the Courts of Queen's Bench and Common Pleas, and from all judgments, orders and decrees of the Court of Chancery. 12 V. c. 63, s. 40.

This court sits as a Court of Law or Equity, according as the appeal comes from Common Law Courts or the Court of Chancery, *Smith v. Har- ton*, 7 U. C. L. J. 263.

An appeal lies from judgments, orders, and decrees of the Court of Chancery, whether they are interlocutory or final, subject to the limitations in point of time specified in s. 55, provided they are pronounced in a cause pending between the parties. Orders made upon petition and not in a suit upon bill filed, are not appealable; and therefore proceedings in appeal from an order obtained upon the petition of a solicitor, which related merely to costs proper to be allowed upon taxation, were quashed under s. 10 of this act, *Re Freeman*, 8 Grant.

An appeal will not be entertained from a decision resting on the discretion of the Court below, *Cinqmars v. Moodie*, 15 U. C. Q. B. 610. But an appeal may be had when the court has refused to decree specific performance, in order to determine whether the judgment of the court below, though in some measure discretionary, has been given in accordance with the general principles which govern Courts of Equity in such cases, *Evans v. Evans*, 9 U. C. L. J. 71.

X. The Court shall have power to quash proceedings in cases brought before it, in which Error or Appeal does not lie, or where such proceedings are taken against good faith, or in which proceedings might here-

tofore have been quashed in the Court, according to the law and practice in England. 20 V. c. 5, s. 6.

The application to quash a non-appealable proceeding is not too late if made before argument, *Re Freeman, supra*.

XI. The Court shall have power to dismiss an Appeal, or to give the Judgment or Decree and to award the process or other proceedings which the Court whose decision is appealed against ought to have given, without regard to the party alleging Error, and may also award restitution and payment of costs. 20 V, c. 5, s. 7.

XII. The Judgment, Decree or award shall be certified by the Clerk of the Court of Error and Appeal to the proper Officer of the Court below, who shall thereupon make all proper and necessary entries thereof, and all subsequent proceedings may be taken thereupon, as if the Judgment, Decree or award had been given in the Court below. 20 V. c. 5, s. 7.

XIII. An appellant may discontinue his proceedings by giving to the respondent a notice headed in the Court and cause, and signed by the appellant or his Attorney, stating that he discontinues such proceedings; and thereupon the respondent shall be at once entitled to the costs of and occasioned by the proceedings in Appeal, and may either sign judgment for such costs or obtain an Order for their payment in the Court below, and may take all further proceedings in that Court as if no appeal had been brought. 20 V. c. 5, s. 8.

XIV. A respondent may consent to the reversal of the Judgment, decree or proceeding appealed against, by giving to the appellant a notice headed in the Court and cause, and signed by the respondent or his Attorney, stating that he consents to the reversal of the Judgment, decree or other proceeding, and thereupon the court shall pronounce Judgment of reversal as of course. 20 V. c. 5, s. 9.

**XV.** No appeal shall be allowed until the appellant has given proper security to the extent of four hundred dollars, to the satisfaction of the Court from whose order, decree or judgment he is about to appeal, that he will effectually prosecute his appeal, and pay such costs and damages as may be awarded in case the judgment or decree appealed from be affirmed. 12 V. c. 63, s. 40.—The proviso, and see Post. ss. 17, 35, 59 & 60.

**XVI.** Upon the perfecting of such security, execution shall be stayed in the original cause, except in the following cases: 12 V. c. 63, s. 40.

1. If the judgment of decree appealed from directs the assignment or delivery or documents of personal property, the execution of the judgment or decree shall not be stayed until the things directed to be assigned or delivered have been brought into court or placed in the custody of such officer or receiver as the court appoints, nor until security has been given to the satisfaction of the court appealed from, and in such sum as that court directs, that the appellant will obey the order of the appellate court; 12 V. c. 63, s. 40, No. 2.

2. If the judgment or decree appealed from directs the execution of a conveyance or any other instrument, the execution of the judgment or decree shall not be stayed until the instrument has been executed and deposited with the proper officer of the court appealed from, to abide the judgment of the appellate court; 12 V. c. 63, s. 40, No. 3.

3. If the judgment or decree appealed from directs the sale or delivery of possession of real property or chattels real, the execution of the judgment or decree shall not be stayed until security has been entered into to the satisfaction of the court appealed from, and in such sum as that court directs, that during the possession of the property by the appellant, he will not commit or suffer to be committed any waste on the property, and that

if the judgment be affirmed, he will pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession thereof, and also, in case the judgment or decree is for the sale of property and the payment of a deficiency arising upon the sale, that the appellant will pay the deficiency; 12 V. c. 63, s. 40, Nos. 4 & 5.

4. If the judgment, order or decree appealed from directs the payment of money, the execution of the judgment or decree shall not be stayed until the appellant has given security, to the satisfaction of the court appealed from, that if the judgment, order or decree, or any part thereof, be affirmed, the appellant will pay the amount thereby directed to be paid, or the part thereof as to which the judgment may be affirmed if it be affirmed only as to part, and all damages awarded against the appellant on the appeal. 12 V. c. 63, s. 40, No. 1.

XVII. When the security has been perfected and allowed, any Judge of the court appealed from may issue his *fiat* to the sheriff, to whom any execution on the judgment or decree has issued, to stay the execution, and the execution shall be thereby stayed whether a levy has been made under it or not. 18 V. c. 123, s. 1.

XVIII. If at the time of the receipt by the sheriff of the *fiat*, or of a copy thereof, the money has been made or received by him but not paid over to the party who issued the execution, the party appealing may demand back from the sheriff the amount made or received under the execution, or so much thereof as is in his hands not paid over, and in default of payment by the sheriff upon such demand, the appellant may recover the same from him in an action for money had and received. 18 V. c. 123, s. 2.

XIX. The death of the appellant after the security has

been perfected and allowed shall not cause the appeal to abate. 20 V. c. 5, s. 10.

XX. The death of the respondent shall not cause the appeal to abate. 20 V. c. 5, s. 11.

XXI. The marriage of a woman appellant or respondent, shall not abate the appeal, but the proceedings in error and appeal shall go on as if no such marriage had taken place, and the decision of the court shall be certified as in other cases. 20 V. c. 5, s. 12.

APPEALS FROM THE COURT OF CHANCERY.

LII. A party desirous of appealing from any Decree or Order in Chancery, shall file a petition of appeal with the Clerk of the Court of Error and Appeal, and shall serve a copy thereof, together with a notice of the hearing of the appeal, on the respondent, his solicitor or agent, at least two months before the time named in such notice for the hearing of the appeal. 20 V. c. 5, s. 34.

LIII. Such petition shall not be answered, but proceedings shall go on as if the petition had been answered and as if the time named in the notice had been appointed by the court for hearing the appeal.

LIV. The petition shall be in the following form:

"IN THE COURT OF ERROR AND APPEAL

"Between A. B., Appellant and C. D., Respondent.

"To the Honourable the Judges of the said Court.

"The petition of the said A. B. sheweth:

"That a Decree (*or* Order) was on                      pronounced  
"by Her Majesty's Court of Chancery for Upper Canada,  
"in a certain cause depending in the said Court, wherein  
"your petitioner was plaintiff (*or* defendant) and the  
"above named C. D. was defendant (*or* plaintiff), which  
"said Decree (*or* Order) has been duly entered and en-  
"rolled.

"That your petitioner hereby appeals from the said Decree (*or* Order), and prays that the same may be reversed or varied, or that such other Decree (*or* Order) in the premises may be made as to your honorable Court seems meet.

"And your petitioner will ever pray, &c."

*(Certificate of Counsel to be added.)*

20 V. c. 5, Sch. A, 3.

LV. In case of an appeal from the Court of Chancery, the appellant shall bring the same to a hearing if the appeal is from a Decree or Decretal Order, within one year from the pronouncing thereof; and if the appeal is from an Interlocutory Order, not being a Decretal Order, then within six months from the pronouncing of the same, or within such further time in either case as may be allowed for the purpose by the Court of Error and Appeal, or by the Court of Chancery or a Judge thereof, upon special grounds shewn to the satisfaction of the Court or Judge granting the same. 20 V. c. 5, s. 35.

LVI. As to a Decree or Order which, under any General Orders of the Court of Chancery, does not become absolute upon the same being pronounced, the time limited for appealing therefrom shall be computed from the time when the same does become absolute. 20 V. c. 5, s. 35.

APPEALS TO HER MAJESTY, IN HER PRIVY COUNCIL.

LVII. The judgment of the Court of Error and Appeal shall be final where the matter in controversy does not exceed the sum or value of four thousand dollars. 12 V. c. 63, s. 46.

LVIII. In a case exceeding that amount, as well as in a case where the matter in question relates to the taking of any annual or other rent, customary or other duty, or fee, or any like demand of a general and public nature



affecting future rights, of what value or amount soever the same may be, an Appeal shall lie to Her Majesty in Her Privy Council. 12 V. c. 63, s. 46.

LIX. But no such Appeal shall be allowed until the appellant has given security in Two thousand dollars, to the satisfaction of the Court appealed from, that he will effectually prosecute the Appeal, and pay such costs and damages as may be awarded in case the Judgment or Decree appealed from be affirmed. 12 V. c. 63, s. 46.

LX. Upon the perfecting of such security, execution shall be stayed in the original cause. 12 V. c. 63, s. 46, and see ante ss. 16, 17 & 35.

LXI. But the provisions of the sixteenth section of this Act shall apply to such Appeal, and the completion of the security hereby required shall not have the effect of staying execution in the cause, in the different cases to which the said section relates, unless the provisions in said section be complied with. 12 V. c. 63, s. 46.

LXII. Every Judge of the Court of Error and Appeal shall have authority to approve of and allow the security to be given by a party who intends to appeal to Her Majesty in Her Privy Council, whether the application for such allowance be made during the sitting of the said Court, or at any other time. 20 V. c. 5, s. 36.

LXIII. Costs awarded by Her Majesty, in Her Privy Council, upon an appeal, shall be recoverable by the same process as costs awarded by the Court of Error and Appeal. 20 V. c. 5, s. 37.

# ORDERS

OF THE

## COURT OF ERROR AND APPEAL.

PASSED 3RD JULY, 1850.

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Whereas, by an act passed in the twelfth year of Her Majesty's reign, intituled, "An act to make further provision for the Administration of Justice, by the establishment of an additional Superior Court of common law, and also a Court of Error and Appeal in Upper Canada, and for other purposes," it was enacted, that a Court of Judicature should be established in that part of this Province called Upper Canada, to be styled "The Court of Error and Appeal," and to be composed of the judges of the Court of Queen's Bench, the Court of Common Pleas, and the Court of Chancery; and that it should be lawful for the said judges of the Court of Appeal, at any time within two years, to make all such general rules and orders as to them might seem expedient for the purpose of adapting the said Court of Appeal to the circumstances of this province, as well in regard to the writs of error or other process by which appeals should be commenced, and the form and mode of suing out such process as in respect of the practice and proceedings of the said court, and also to regulate the allowance and amount of costs, and from time to time to make other rules and orders, amending, altering, or rescinding the same: provided always, that no such rules or orders should have the effect of altering the principles or rules of decision of the said court or any of them, or of abridging or affecting

the right of any party to such remedy as before the passing of that act might have been obtained in the court of appeal thereby abolished ; but might in all respects extend the manner of obtaining such remedy by regulating the practice of the said court in whatever way might to them seem expedient for better attaining the ends of justice ; and that all such rules, orders or regulations should be laid before both houses of the Provincial Parliament, if then in session, immediately upon the making of the same, or if the Parliament should not be then in session, then within five days after the meeting thereof ; and that no such rule, order or regulation should have effect until within six weeks after the same should have been so laid before both houses of the legislature, and that any such order so made should, from and after such time aforesaid, be binding and obligatory on the said court and all other courts in the said province of Upper Canada to which the same should be made expressly to extend.

III. That, unless otherwise especially ordered, such security shall be personal and by bond, and may be in the form prescribed in rule number five, and shall be filed in the principal office of the court appealed from.

IV. That the security for costs required by the statute 12 Vic. c. 63, sec. 40, shall be given by bond to the respondent or respondents in the sum of one hundred pounds, being the sum named in the statute, which bond shall be executed by the appellant or appellants, or one of them, and by two sufficient sureties, (or if the appellant or appellants be absent from or do not reside in Upper Canada, then by three sufficient sureties,) and the conditions thereof shall be to the effect that the appellant or appellants shall and will effectually prosecute his or their appeal, and pay such costs and damages as shall be awarded in case the judgment appealed from shall be affirmed or in part

affirmed. The bond and conditions may be in the form given by rule number five.

V. That the bond for securing costs shall be in the following form :

For forms of bond and affidavit, see Appendix of Forms.

VI. That when the judgment to be appealed from directs the payment of money, and the appellant desires to stay the execution thereof, then the bond or security aforesaid shall be double the amount of such judgment, unless the same shall be in debt or bond for a penal sum or upon a warrant of attorney or *Cognovit Actionem* or otherwise, exceeding in amount the sum really due, in which case the bond shall be in double the true or real debt and costs only ; and the amount so recovered, and of such true and real debt and costs shall be stated in the condition or recital to the condition of the bond or security, immediately after the statement of the nature of the action, and the condition shall be to the effect that the said (appellant) shall effectually prosecute such appeal, and if the said judgment so to be appealed from or any part thereof shall be affirmed, shall pay the amount directed to be paid by the said judgment, or the part of such amount as to which the said judgement shall be affirmed (if it be affirmed only in part) and all damages which shall be awarded against the said appellant in the appeal : provided always, that in cases where the security to be given shall be in a sum above five hundred pounds, it shall be in the discretion of the court appealed from, or of a judge thereof in vacation, to allow security to be given by a large number of obligors, apportioning the amount among them as shall appear reasonable.

VII. That when the judgment appealed from shall be in an action of ejectment, the security required by the last preceding rule shall be taken in double the yearly value of the property in question ; and in cases where the mat-

ter in question shall relate to the taking of any annual or other rent, customary or other duty or fee, or any other such like demand of a general and public nature, affecting future rights, the amount in which security shall be taken in addition to the security required for costs shall be fixed by order of a judge of the court appealed from.

VIII. That the security required by the two last preceding rules shall be given by bond, and the recitals and condition in such bond shall be such as shall conform to the provisions or the said two rules, with such further or other conditions, in cases where the judgment is not for the payment of a sum of money only, as the judge approving such security may think fit to order.

IX. That the parties to such bond, as sureties, shall, by affidavit respectively, make oath that they are resident householders or freeholders in Upper Canada, and severally worth the sum mentioned in such bond, over and above what will pay and satisfy all their debts; which affidavit may be in the following form;—

For forms of bond and affidavits, see Appendix of Forms.

X. That fourteen days' notice shall be given of the time and place at which application will be made to the court from whose judgment it is intended to appeal, or to a judge thereof in vacation, for the allowance of such security; which notice shall contain the names and additions of the obligors.

XI. That the allowance of such security may be opposed by affidavit; but that in the absence of any such opposition, the affidavit above mentioned shall be sufficient, in the discretion of the judge, to warrant the allowance thereof.

XII. That, if allowed, the officer of the court shall endorse on such bond the word "allowed," prefixing the

date and signing his name thereto ; upon which, such security shall be deemed perfected.

No case has been decided in the Court of Chancery except *Re Freeman*, and cases cited *supra* p. 239, bearing on the practice in cases of appeals from the Court of Chancery to this court, but any question which may arise will most probably be decided in accordance with the principles enunciated in *Grant v. Great Western Railway Co.*, 8 U. C. C. P. 348. In this an application to stay the proceedings in appeal on the ground of irregularity, no notice of the grounds of appeal having been served or formal leave of appeal asked, all parties having understood the case would be appealed, the Court of Common Pleas refused to make the rule. M. C. Cameron, *arguendo*, "The plaintiff shows no ground for interference by this court, and the case having properly gone to the Court of Appeal, if not pursued there according to the practice, that court was the proper place to apply for a remedy." And Richards, J., (who delivered the judgment of the court] "As the statute was passed since the rules of the Court of Appeal were framed, there can be no doubt that its provisions must prevail when the rules or the statute conflict," — "Proceedings in appeal shall be a *supersedeas* of the execution from the perfecting and allowance of the security required." "If a respondent is not aware of the appellants ground of appeal and desires to ascertain them, the statute of rules of the Court of Appeal afford him ample means of obtaining them, or of depriving the party of his remedy in that court if he refuses to furnish them."

XIII. That cases coming within the Twelfth Victoria, chapter sixty-three, section forty, numbers two and four, shall be disposed of by special order, as the occasion may require ; except that the security thereunder shall be personal and by bond as aforesaid.

XXIII. That when the grounds of appeal and answer thereto are filed, the cause shall, on application of either party, be set down for argument by the clerk of this court, for a day to be fixed, of which notice shall be duly given to the opposite party, his attorney or agent, at least four days before the day appointed for the hearing of such appeal.

XXIV. Four clear days before the day appointed for argument the appellant shall deliver to the clerk of the Court of Error and Appeal, for the use of the judges

thereof, two copies of the judgment of the court below, and of the reasons of appeal, and of the pleadings or answers thereto ; and in default thereof the appeal may be dismissed with costs.

XXV. That the result of the appeal in this court shall be certified to the court appealed from by the clerk, under the seal of this court, which certificate shall briefly state that the judgment has been affirmed, reversed or modified (as the case may be), with or without costs ; and when with costs, to be paid by either party, adding the amount thereof when the same shall have been taxed, as taxed ; and that upon such certificate being filed in the court below, any entry thereof may be suggested on the roll, and further proceedings in that court be had, according to the course and practice of such court ; and in case of any new question arising, according to the course and practice of the Court of Queen's Bench in England.

Provided that the respondent, if the successful party, may proceed upon the judgment by execution, and upon the bond or security required to be given under the statute and the foregoing rule in that behalf ; or he may adopt either course separately, without prejudice to his other remedy by waiver, delay or otherwise.

XXVI. That all writs and all rules and orders of this court in cases appealed shall be tested or bear date the day after their issuing, and be signed by the clerk of the court.

XXVII. That no writ of appeal shall be a supersedeas of execution until service of the notice of the allowance thereof, containing a statement of some particular ground of appeal intended to be argued. Provided, that if the error stated in such notice shall appear to be frivolous, the court or a judge, upon summons and proof of the service thereof by affidavit, may order execution to issue.

*Coiton v. Corby*, 5 U. C. L. J. 67. An injunction had been obtained staying proceedings in an action at law ; by the decree of the Court of



Chancery the plaintiffs' bill was declared to be improperly filed and the defendant was about to proceed at law. The court, however, suspended the operation of its decree to allow an appeal to be entered. *Blake C.*, "There is no doubt but this court has full power over its decrees as to the time of their operation. In England it was competent for the House of Lords in cases of appeal to suspend proceedings; and the Court of Chancery there has at all times full power over its own decrees to suspend their operation, and has frequently exercised it, owing to the great delay which formerly occurred in carrying out the appeal. In the case of *Mayor of Gloucester v. Wood*, 3 Hare 150, *Wigram, V. C.* though he dismissed the bill refused to allow the money to be taken out of court until the appeal could be made. In this country the Legislature has laid down the reverse rule from that in England, that not staying proceedings in appeal should be the rule and staying them the exception. I take it to be clearly our duty to stay our decree, as otherwise irreparable injury may be the result—as in the case of an ejectment for instance."

"I cannot agree to the doctrine that because of the late Error and Appeal Act this court cannot exercise jurisdiction. This court has all the power it ever had, and the new law regulating the power of appeal has not altered our practice."

Where the question was one of priority, the appellant assignee of a mortgagor, was held not liable to give additional security under section 16, sub-section 4, to the respondent's judgment creditors, *B. U. C. v. Patroff*, 8 U. C. L. J. 328.

XXVIII. That in appeals from the Court of Chancery, all securities under the fortieth section of the said Act of the Provincial Parliament, passed in the twelfth year of the reign of Her present Majesty, chapter sixty-three, shall be in the form of a bond, which, together with the affidavit of justification, shall be filed with the registrar of the said court, and notice thereof served on the respondent, his solicitor or agent; and the same shall stand allowed, unless the respondent shall within fourteen days after service of such notice move the said court to disallow the same. A special application shall be necessary to stay proceedings under any of the exceptions in the said section of the said act.

XXIX. That the petition of appeal shall be in the form set forth to the schedule to this order. The petition of appeal shall be filed with the clerk of the court, and a

copy thereof, together with a notice of the hearing of the appeal, shall be served on the respondent, his solicitor or agent, at least two months before the time named in such notice for the hearing of the appeal. Such petition shall not be answered, but at the time named in such notice the parties must attend to argue the appeal; and upon the filing of the petition, and service of a copy thereof and of such notice, the appeal shall stand in the same plight as if the petition had been answered, and such time appointed by this court for the hearing thereof.

For the form of petition of appeal, see act respecting the Court of Error and Appeal, sec. 54.

XXX. That the printed cases shall be and are hereby abolished, but copies of the pleadings and evidence shall be printed, as at present done in the appendix to the case, to which the reasons of appeal, and for supporting the decree or order, shall be appended; and the same rules shall apply to such printed copies and reasons as now apply to the printed cases, and the same shall for all purposes be considered the printed cases of the appellant and respondent respectively. Provided always, that nothing herein contained shall prevent the parties from joining in printing such copies as they now do in printing the appendix, if they shall be so disposed. Such printed cases must be deposited with the clerk of the court for the use of the judges, at least four days before the hearing of the appeal.

XXXI. That when it shall be intended to appeal to Her Majesty in the Privy Council, the securities required by the statute twelfth Victoria, chapter sixty-three, section forty-six, shall be personal and by bond to the respondent or respondents—such bond to be executed by the appellant or appellants, or one of them, and two sufficient sureties (or if the appellant or appellants be absent from or do not reside in Upper Canada, then by three

sufficient sureties) in the penal sum of five hundred pounds, in cases coming within the first part of the said section fort-six; the condition of which bond shall be to the effect that the appellant (or appellants) shall and will effectually prosecute his (or their) appeal, and pay such costs and damages as shall be awarded in case the judgment (or decree) appealed from shall be affirmed or in part affirmed, and that execution shall not be stayed in the original cause until security shall further be given by bond, in conformity to the sixth, seventh and eighth rules, when from the nature of the case such further security shall be requisite: And in cases from chancery-application to the Court of Appeal to stay proceedings, shall be by motion or notice; which motion, if granted, shall be upon such terms as to security under the statute or otherwise, as the circumstances and nature of the case require.

XXXII. That the bond or security referred to in the last rule shall be in the following form.

See Appendix of forms, for form of Bond.

XXXIII. That in every case of appeal to Her Majesty in Council, the obligors, parties to any bond as sureties, shall justify their sufficiency by affidavit, in the manner and to the same effect as is required by rule number nine of this court.

XXXIV. In cases appealed from either of the courts of common law, or from the Court of Chancery, the same fees and allowance shall be taxed in appeal by the clerk of the Court of Error and Appeal for attornies and solicitors, or any officer of the said court, as are allowed for similar services in the court from which the appeal should have been brought; and that counsels' fees shall be taxed in the discretion of the clerk provided that no fee to counsel exceeding ten pounds shall be taxed without an order of the judge who presided on the argument, or in his absence of the next senior judge.

XXXV. That the regular and appointed days or times of sitting of this court shall be the second Thursday after the several terms of Hilary, Easter and Michaelmas, as appointed by the statute 12 Vic. ch. 63, sec., 13, at eleven o'clock in the forenoon: Provided, however, that the said court may adjourn from time to time, and meet at such other periods as shall be appointed for the hearing and disposing of any business brought before it.

By 25 Vic. cap. 18, the times for the sitting of the Court of Error and Appeal, are to be the fourth Thursday next after the several terms of Hilary, Easter and Michaelmas. It may adjourn from time to time, and meet again at the time fixed on the adjournment, for the transaction of business.

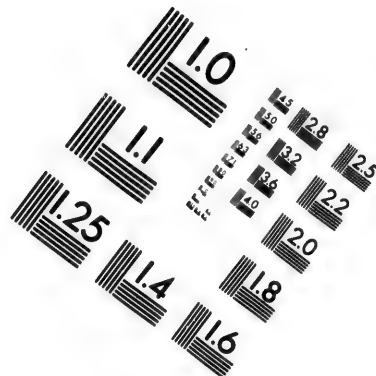
ORDER 27TH JUNE, 1856.

Ordered that copies of the pleadings and evidence shall be printed, in all cases appealed, together with the reasons of appeal, and the reasons relied upon for supporting the judgment, decree, or order; and the opinions of the judges in the Court below, when not published in the Reports; which copies shall, for all purposes, be considered the printed cases of the appellant and respondent respectively, and a copy must be deposited with the Clerk of the Court for the use of each of the judges at least four days before the hearing of the appeal.

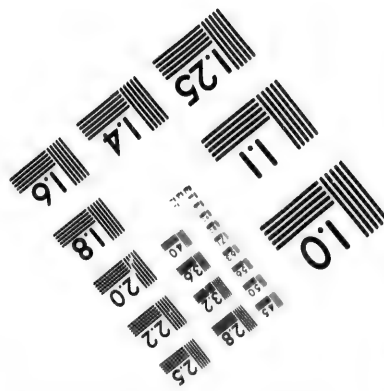
ORDERS 21ST DECEMBER, 1858.

It is ordered that, after the present sittings of this court, the clerk shall receive no appeal books unless they be printed, on one side only, on good paper, in demy quarto form, with small pica type.

It is ordered that in all cases in which the case for appeal is required to be settled by any judge of either of the courts; the appellant shall serve on the opposite party a copy of the case he intends to submit for the judges approval, at least four days before the application to have the case settled.



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**23 WEST MAIN STREET  
WEBSTER, N.Y. 14580  
(716) 872-4003**



CON. STAT. U. C. CAP. XV.—AN ACT RESPECT-  
ING COUNTY COURTS.

XXXIII. The County Courts in Upper Canada shall possess the like jurisdiction and authority in respect of the matters hereinafter mentioned as was possessed by the Court of Chancery of Upper Canada, on the twenty-third May, one thousand eight hundred and fifty-three. 16 V. c. 119, s. 1.

XXXIV. Any person seeking equitable relief may (personally or by attorney) enter a claim against any person from whom such relief is sought, with the clerk of the County Court of the county within which such last mentioned person resides, in any of the following cases, that is to say: 16 V. c. 119, s. 2.

1. A person entitled to and seeking an account of the dealings and transactions of a partnership dissolved or expired, the joint stock or capital not having been over eight hundred dollars;

2. A creditor upon the estate of any deceased person, such creditor seeking payment of his debt (not exceeding two hundred dollars) out of the deceased's assets (not exceeding eight hundred dollars);

3. A legatee under the will of any deceased person, such legatee seeking payment or delivery of his legacy (not exceeding two hundred dollars in amount or value) out of such deceased person's personal assets (not exceeding eight hundred dollars);

4. A residuary legatee, or one of the residuary legatees of any such deceased person seeking on account of the residue and payment or appropriation of his share therein (the estate not exceeding eight hundred dollars);



5. An executor or administrator of any such deceased person seeking to have the personal estate (not exceeding eight hundred dollars) of such deceased person, administered under the direction of the Judge of the County Court of the county within which such executor or administrator resides ;

6. A legal or equitable mortgagee whose mortgage, has been created by some instrument in writing, or a judgment creditor having duly registered his judgment, or a person entitled to a lien or security for a debt, seeking foreclosure or sale or otherwise to enforce his security, where the sum claimed as due does not exceed two hundred dollars ;

7. A person entitled to redeem any legal or equitable mortgage or any charge or lien and seeking to redeem the same, where the sum actually remaining due does not exceed two hundred dollars ;

8. Any person seeking equitable relief for, or by reason of any matter whatsoever, where the subject matter involved does not exceed the sum of two hundred dollars.

XXXV. Injunctions to restrain the committing of waste or trespass to property by unlawfully cutting, destroying or removing trees or timber, may be granted by the judge of any county court, and such injunctions shall only remain in force for a period of one month, unless sooner dissolved on an application to the Court of Chancery ; but the power to grant such injunction shall not authorize the prosecuting of the suit in the county court, and the injunction may be extended and the suit further prosecuted to judgment or otherwise in the Superior Court in the like manner as if the same had originated in that court.

A defendant moving to dissolve an injunction issued from a County Court, is not bound to have the proceedings returned from the County Court office, *Abraham v. Shepherd*, 4 Grant 260 ; but, where the plaintiff

moves to extend an injunction issued in a County Court, it is his duty to have the papers transmitted before the motion is heard, *Stevenson v. Huffman*, 4 Grant 318.

LVII. Any claim entered on the Equity side of a County Court may be removed by either party into the Court of Chancery by order of that court, to be obtained on a summary application by motion or petition supported by affidavit, of which reasonable notice shall be given to the opposite party, and the order shall be made on such terms as to payment of costs, giving security in respect to the relief claimed and costs, or upon such other terms as to the Court of Chancery may seem just ; but no claim shall be removed, unless the Court of Chancery be of opinion that the nature of the claim renders it a proper one to be withdrawn from the jurisdiction of the County Court, and disposed of in the Court of Chancery, and the said Court of Chancery shall make the necessary regulations for the practice to be observed in proceedings under this section. 16 V. c. 119, s. 17.

LVIII. In order that the mode of proceeding under this Act may be fully traced out, and from time to time improved and rendered as simple, speedy and cheap as may be, it shall be the duty of the Judges of the Court of Chancery, to frame such General Rules and Orders and all such forms as to them may seem expedient, concerning the process, practice, Orders and proceedings on the Equity side of the County Courts under this Act, and in relation to any of the provisions thereof as to which there may arise doubts ; and from time to time to alter and amend such Rules, Orders and Forms, and also the forms and mode of procedure prescribed by this Act ; and such Rules, Orders and Forms as may be made and framed by the Judges or any two of them, (of whom the Chancellor of Upper Canada shall be one,) shall, from and after a day to be named therein, be in force in every County Court, and shall be of the same

force and effect as if the same had been embodied in an Act of Parliament. 16 V. c. 119, s. 19.

LXIII. If any suit or proceeding be commenced in the Court of Chancery for any cause or claim which might have been entered in a County Court, no costs shall be taxed against the Defendant in such suit or proceeding, and the Defendant, if he succeeds in the suit, shall be entitled to a Decree against the Plaintiff for his costs, as between Attorney and Client, unless the Court of Chancery be of opinion that it was a fit cause or claim to be withdrawn from a County Court and entered in the Court of Chancery. 16 V. c. 119, s. 22.

LXIX. Either party may appeal to the Court of Chancery against any Order or Decree made by the Judge of a County Court under the Equity Jurisdiction conferred by this Act; and the Court of Chancery shall make such Order thereupon in respect to costs or otherwise, or for referring back the matter to the Judge before whom the same was first heard, as may be just and proper; But before the County Court Judge is called on to certify to the Court of Chancery, the Order or other matter appealed against, the party appealing shall enter into a recognizance, with sufficient sureties to the satisfaction of the Judge, to pay the sum decreed in case relief be not had on the appeal, or to obey the Order, (or as the case may be;) and when the party appealing appears by Attorney, an affidavit shall be made by the Attorney, that the appeal is not intended for delay as he believes, and that there is, in his opinion, probable cause for reversing the Order or Decree against which the appeal is made; and the Court of Chancery shall specially make the necessary regulations for the practice to be observed in proceedings under this section. 16 V. c. 119, s. 18.

**CON. STAT. U. C. CAP. XVI.—AN ACT RESPECTING THE SURROGATE COURTS.**

XXVI. Any person considering himself aggrieved by any order, sentence, judgment or decree of any Surrogate Court, or being dissatisfied with the determination of the judge thereof in point of law in any matter or cause under this Act, may, within fifteen days next after such order, sentence, judgment, decree or determination, appeal therefrom to the Court of Chancery, in such manner and subject to such regulations as may be provided for by the rules and orders made under the Surrogate Courts Act 1858, or under this Act, and the said Court of Chancery shall hear and determine such appeals; but no such appeal shall be had or lie unless the value of the goods, chattels, rights or credits to be affected by such order, sentence, judgment, decree or determination, exceeds two hundred dollars. 22 V. c. 93, s. 20.

XXVII. In every case in which there is contention as to the grant of Probate or Administration, and the parties in such case thereto agree, such contention shall be referred to and determined by either of Her Majesty's Superior Courts of Law or by the Court of Chancery, on a case to be prepared, and the Surrogate Court having jurisdiction in such matter shall not grant Probate or Administration until such contention be terminated and disposed of by judgment, decree or otherwise. 22 V. c. 93, s. 21.

XXVIII. Any case or proceeding in the said Surrogate Courts in which any contention arises as to the grant of Probate or administration, or in which any disputed question may be raised (as to law or facts), relating to matters and causes testamentary, shall be removable by any party to such cause or proceeding into the Court of Chancery by order of a judge of the said court to be obtained on a summary application supported by affidavit,

of which reasonable notice shall be given to the other parties concerned. 22 V. c. 93, s. 22.

XXIX. The judge making such order may impose such terms as to payment or security for costs or otherwise as to him may seem fit; but no case or proceeding shall be so removed unless it be of such a nature and of such importance as to render it proper that the same should be withdrawn from the jurisdiction of the Surrogate Court and disposed of by the Court of Chancery, nor unless the personal estate of the deceased exceeds two thousand dollars in value. 22 V. c. 93, s. 22.

XXX. Upon any case or proceeding being so removed as aforesaid, the Court of Chancery shall have full power to determine the same, and may cause any question of fact arising therein to be tried by a jury and otherwise deal with the same as with any cause or claim originally entered in the said Court of Chancery; and the final order or decree made by the said Court of Chancery in any cause or proceeding removed as aforesaid, shall, for the guidance of the said Surrogate Court, be transmitted by the Surrogate clerk to the registrar of the Surrogate Court from which cause or proceeding was removed. 22 V. c. 93, s. 22.

XXXI. There shall be a clerk appointed to be called the surrogate clerk, who shall perform the duties required of the surrogate clerk by this act as well as the duties that by the rules and orders made as hereinbefore mentioned may be required of such surrogate clerk, and also such other duties as may be required of him by the Court of Chancery, and such surrogate clerk shall be deemed an officer of the said Court of Chancery, and be paid a fixed salary not exceeding one thousand six hundred dollars yearly, and the governor shall from time to time appoint and at his pleasure remove such clerk. 22 V. c. 93, s. 23.

CON. STAT. U. C. CAP. XXIV.—AN ACT RESPECTING ARREST AND IMPRISONMENT FOR DEBT.

VIII. The Writ of *Ne exeat Provincia* shall be called a Writ of Arrest, and no order shall be granted for a Writ of Arrest unless the party applying for the writ has a cause of suit to at least such an amount, and shews by affidavit such facts and circumstances, as this Act requires in the case of a special order for holding a party to bail under the fifth section of this Act. 22 V. c. 33, s. 1. (1859.)

IX. In suits for alimony, instituted after this Act takes effect, the Court or a Judge thereof may, in a proper case, order a Writ of Arrest to issue at any time after the bill has been filed, and shall, in the order, fix the amount of bail to be given by the defendant, in order to procure his discharge. 20 V. c. 56, s. 3.

X. In case an order is made for a Writ of Arrest, in a suit for alimony, the amount of the bail required shall not exceed what may be considered sufficient to cover the amount of future alimony for two years, besides arrears and costs, but may be for less at the discretion of the Court. 22 V. c. 33, s. 2. (1859.)

XI. The bail or security required to be taken under a "Writ of Arrest" shall not be that the person arrested will not go or attempt to go out of Upper Canada, but shall merely be to the effect that the person arrested will perform and abide by the orders and decrees made or to be made in the suit, or will personally appear for the purposes of the suit at such times and places as the Court may from time to time order, and will, in case he becomes liable by law to be committed to close custody, render himself (if so ordered), into the custody of any

Sheriff the Court may from time to time direct. 22 V. c. 33, s. 3. (1859.)

XIII. Process of contempt for non-payment of any sum of money, or for non-payment of any costs, charges or expenses, payable by any decree or order of the Court of Chancery, or of a Judge thereof, or by any rule or order of the Court of Queen's Bench or Common Pleas or of a Judge thereof, or by any decree, order or rule of a County Court or of a Judge thereof, is abolished; and no person shall be detained, arrested or held to bail for non-payment of money, unless a special order for the purpose be made on an affidavit or affidavits establishing the same facts and circumstances as are necessary for an order for a Writ of *Capias ad Satisfaciendum*, under this Act; and in such cause the arrest when allowed shall be made by means of a Writ of Attachment corresponding as nearly as may be to a Writ of *Capias ad Satisfaciendum*. 22 V. c. 33, s. 4. (1859.)

XIV. But in case a party be arrested under a Writ of Arrest, it shall not be necessary before suing out a writ under the preceding section of this Act to obtain a Judge's order therefor, or to file any further affidavit than the affidavits on which the order for the Writ of Arrest was obtained. 22 V. c. 33, s. 5. (1859.)

XV. Every decree or order of the Court of Chancery, and every rule or order of the Court of Queen's Bench or Common Pleas, and every decree, order or rule of a County Court, directing payment of money or of costs, charges or expenses, shall, so far as it relates to such money, costs, charges or expenses, be deemed a judgment, and the person to receive payment a creditor, and the person to make payment a debtor, within the meaning of this Act; and the said persons shall respectively have the same remedies, and the Courts and Judges and the officers of Justice shall in such cases have the same



powers and duties, as in corresponding cases under this Act. 22 V. c. 33, s. 14. (1859.)

XIX. For the purpose of enforcing payment of any money or of any costs, charges or expenses payable by any decree or order of the Court of Chancery, or any rule or order of the Court of Queen's Bench or Common Pleas, or any decree, order or rule of a County Court, the person to receive payment shall be entitled to Writs of *Fieri Facias* and *Venditioni Exponas* respectively, against the property of the person to pay, and shall also be entitled to attach and enforce payment of the debts of or accruing to the person to pay, in the same manner respectively and subject to the same rules, as nearly as may be, as in the case of a judgment at law in a civil action; and such writs shall have the like effect as nearly as may be, and the Courts and Judges shall have the same powers and duties in respect to the same and in respect to the proceedings under the same, and the parties and Sheriff respectively shall have the same rights and remedies in respect thereof, and the writs shall be executed in the same manner and subject to the same conditions, as nearly as may be, as in the case of like writs in other cases; but subject to such general orders and rules varying or otherwise affecting the practice in regard to the said matters, as the Courts respectively may from time to time make under their authority in that behalf. 22 V. c. 33, s. 12. (1859.)

XX. In case a decree or order in Chancery, or of a County Court in the exercise of the equitable jurisdiction of such County Court, directs the payment of money into Court or to the credit of any cause, or otherwise than to any person, the person having the carriage of the decree or order, so far as relates to such payment, shall be deemed the plaintiff within the meaning of this Act. 22 V. c. 33, s. 15. (1859.)

XXI. The Court of Chancery may also issue Writs of Sequestration as hitherto or in such cases as by general or other orders the Court may think expedient; and nothing in this Act shall be construed to take away the jurisdiction of the Court under or by means of such writs; and no writ shall issue from Chancery against the lands of the person to pay, but if the decree or order be registered, the Court may enforce the charge thereby created upon real estate, according to the practice of the Court in the case of a charge on real estate created by other means. 22 V. c. 33, s. 13. (1859.)

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CON. STAT. U. C. CAP. XXXII.—AN ACT RESPECTING WITNESSES AND EVIDENCE.

I. In any case, criminal or civil, in which an oath, declaration or affirmation is required by law, or upon any lawful occasion whatever on which the oath of any person is by law admissible, a Quaker, Menonist or Tunker, or a member of the church known as the "Unitas Fratrum," or the United Brethren, sometimes called the Moravian Church, having first made the following declaration or affirmation, viz: "I, A. B., do solemnly, sincerely and truly declare and affirm that I am one of the Society called Quakers, Menonists, Tunkers or Unitas Fratrum or Moravians," (*as the case may be*,) may make his affirmation or declaration in the form following, that is to say: "I, A. B., do solemnly, sincerely and truly declare and affirm, &c.;" and such affirmation or declaration shall have the same force and effect to all intents and purposes in all courts of law and Equity and all other places, as an oath taken in the usual form. 49 G. 3, c. 6,—10 G. 4, c. 1.

II. Every person authorized or required to administer an oath for any purpose, may administer such affirma-

tion or declaration. 49 G. 3, c. 6, ss. 1, 2, 3,—10 G. 4, c. 1,—22 V. c. 100, s. 101.

III. No person offered as a witness shall, by reason of incapacity from crime or interest, be excluded from giving evidence, either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer or person having by law, or by consent of parties, authority to hear, receive and examine evidence. 16 V. c. 19, s. 1.

IV. Every person so offered shall be admitted and be compellable to give evidence on oath, or solemn affirmation where an affirmation is receivable, notwithstanding that such person has or may have an interest in the matter in question or in the event of the trial of some issue, matter, question of injury, or of the suit, action or proceeding in which he is offered as a witness, and notwithstanding that such person so offered as a witness, had been previously convicted of a crime or offence. 16 V. c. 19, s. 1.

V. This act shall not render competent or authorize or permit any party to any suit or proceeding, individually named in the record, or any claimant or tenant of premises sought to be recovered in ejectment, or the landlord or other person in whose right any defendant in *replevin* may make cognizance, or any person in whose immediate or individual behalf any action may be brought or defended either wholly or in part, or the husband or wife of any such party to be called as a witness on behalf of such party, but such party may in any civil proceeding be called and examined as a witness in any suit or action at the instance of the opposite party; provided always, that the wife of the party to

any suit or proceeding named in the record, shall not be liable to be examined as a witness by or at the instance of the opposite party. 16 V. c. 19, s. 1.

VI. Whenever any book or other document is of so public a nature as to be admissible in evidence on its mere production from the proper custody, and no other statute exists which renders its contents proveable by means of a copy, a copy thereof or extract therefrom shall be admissible in evidence in any court of justice, or before any person having by law or by consent of parties, authority to hear, receive and examine evidence, provided it be proved that it is an examined copy or extract, or that it purports to be signed and certified as a true copy or extract by the officer to whose custody the original has been entrusted, 16 V. c. 19, s. 9.

VII. Such officer shall furnish such certified copy or extract to any person applying for the same at a reasonable time upon his paying therefor a sum, not exceeding ten cents, for every folio of one hundred words. 16 V. c. 19, s. 9.

VIII. If any officer authorized or required by this act, or by any law or usage in force in Upper Canada, to furnish any certified copies or extract, wilfully certifies any document to be a true copy or extract, knowing that the same is not a true copy or extract, he is guilty of a misdemeanor, and shall upon conviction be imprisoned for any term not exceeding eighteen months. 16 V. c. 19, s. 10.

IX. In any action at law or suit in Equity where, according to the existing law exclusive of the provisions contained in this act, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, the party intending to establish in proof such de-

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visé or other testamentary disposition, may give notice to the opposite party ten days at least before the trial or other proceeding in which the said proof is intended to be adduced, that he intends at the said trial or other proceeding to give in evidence as proof of the devise or other testamentary disposition, the probate of the will or letters of administration with the will annexed, or a copy thereof, stamped with the seal of the Surrogate Court granting the same; and in every such case probate or letters of administration or copy thereof, respectively stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid, in a contentious cause or matter, unless the party receiving such notice does within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition. 22 V. c. 93, s. 33.

X. In every case in which in any such action or suit the original will is produced and proved, the court or judge before whom such evidence is given may direct by which of the parties the costs thereof shall be paid. 22 V. c. 93, s. 36.

XI. In case of the death of any person in any of Her Majesty's possessions out of Upper Canada, after having made a will sufficient to pass real estate in Upper Canada, and whereby any such estate has been devised, charged or affected, and in case such will be duly proved in any court having the proof and issuing probate of wills in any of such possessions, and remains filed in such court, then in case notice of the intention to use such probate or certificate in the place of the original will, be given to the opposite party in any such proceeding one month before the same is to be so used, the production of the probate of the will, or a certificate of the judge,

registrar or clerk of such court, that the original is filed and remains in the court, and purports to have been executed before two witnesses, shall, in any proceeding in any court of law or Equity in Upper Canada concerning such real estate, be sufficient *prima facie* evidence of such will and the contents thereof, and of the same having been executed so as to pass real estate, without the production of the original will; but such probate or certificate shall not be used if, upon cause shewn before any such court, or any judge thereof, such court or judge finds any reason to doubt the sufficiency of the execution of such will to pass such real estate as aforesaid, and makes a rule or order disallowing the production of such probate. 16 V. c. 19, s. 5.

XII. The production of the certificate, in the last preceding section mentioned, shall be sufficient *prima facie* evidence of the facts therein stated, and of the authority of the judge, registrar or clerk, without any proof of his appointment, authority or signature. 16 V. c. 19, s. 6.

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CON. STAT. U. C. CAP. LXIX.—AN ACT RESPECTING THE PROPERTY OF RELIGIOUS INSTITUTIONS IN UPPER CANADA.

VIII. When land held by trustees for the use of a congregation or religious body, becomes unnecessary to be retained for such use, and it is deemed advantageous to sell the land, the trustees for the time being may give notice of an intended sale, specifying the premises to be sold and the time and terms of sale; and after publication of the notice for four successive weeks, in a weekly paper published in or near the place where the lands are situated, they may sell the land at public auction according to the notice, but the trustees shall not be obliged to complete or carry a sale into effect if in their judgment an adequate price is not offered for the land.

IX. The trustees may thereafter sell the land either by public or private sale ; but a less sum shall not be accepted at private sale than was offered at public sale.

X. Before a deed is executed in pursuance of a public or private sale, the congregation or religious body for whose use the lands are held, shall be duly notified thereof, and the sanction of the court of chancery obtained for the execution of the deed. 18 V. c. 119, s. 5,—12 V. c. 91, s. 2.

XI. Trustees selling or leasing land under the authority of this act shall, on the first Monday in July in every year, have ready and open for the inspection of the congregation or religious body which they represent, or of any member thereof, a detailed statement shewing all rents which accrued during the preceding year, and all sums of money whatever in their hands for the use and benefit of the congregation or religious body, which were in any manner derived from the lands under their control or subject to their management, and also shewing the application of any portion of the money, which has been expended on behalf of the congregation or body. 18 V. c. 119, s. 6.

XII. The Court of Chancery may in a summary manner, on complaint upon oath by three members of a congregation or religious body, of any misfeasance or misconduct on the part of trustees in the performance of duties authorized by this act, call upon the trustees to give in an account ; and may enforce the rendering of such account, the discharge of any duties, and the payment of any money, so that the congregation or religious body may have the benefit thereof ; and the court may compel the trustees, in case of any misconduct, to pay the expense of the application, or may award costs to the trustees in case the application be made on grounds which the court considers insufficient or frivolous or vexatious. 18 V. c. 119, s. 7.



CON. STAT. U. C. CAP. LXXIV.—AN ACT RESPECTING CUSTODY OF INFANTS.

VIII. Any of the Superior Courts of Law or Equity in Upper Canada, or any judge of any of such courts, upon hearing the petition of the mother of any infant, being in the sole custody or control of the father thereof, or of any person by his authority, or of any guardian after the death of the father, may, if such court or judge sees fit, make order for the access of the petitioner to such infant, at such times and subject to such regulations as such court or judge thinks convenient and just, and if such infant be within the age of twelve years, may make order for the delivery of such infant to the petitioner, to remain in the care and custody of the petitioner until such infant attains the age of twelve years, subject to such regulations as such court or judge may direct, and such court or judge may also make order for the maintenance of such infant by payment by the father thereof, or by payment out of any estate to which such infant may be entitled, of such sum or sums of money from time to time, as, according to the pecuniary circumstances of such father or the value of such estate, such court or judge thinks just and reasonable. 18 V. c. 126, s. 1.

IX. The court or judge as aforesaid may enforce the attendance of any person before such court or judge, to testify on oath respecting the matter of such petition by order or rule made for that purpose, and on the service of a copy thereof and the payment of expenses as a witness, in the same manner as in a suit or action in the said courts respectively, or may receive affidavits respecting the matters in such petition. 18 V. c. 126, s. 2.

X. All orders made by the court or a judge by virtue of this act, shall be enforceable by process of contempt by the court or judge by which or by whom such order has been made. 18 V. c. 126, s. 3.

XI. No order directing that the mother shall have the custody of or access to an infant shall be made by virtue of this act, in favour of a mother, against whom adultery has been established by judgment in an action for criminal conversation, at the suit of her husband against any person. 18. V. c. 126, s. 4.

As to the objects contemplated by the English Act 2 & 3 Vic. c. 54 upon which this statute is founded, see Lord Cottenham's judgment in *Warde v. Ward*, 2 Phill. 787.

As to where jurisdiction will be exercised by the court, see *Re Finn*, 2 DeG. & S. 457; such jurisdiction extends both to foreign infants in the country and native infants out of the jurisdiction, *Hope v. Hope*, 4 DeG. M. & G. 346.

Under this statute a married woman may petition in her own name without naming next friend, *Re Groom*, 7 Hare 38; and the order may be made *ex parte*, if the necessity of the case requires it, *Re Taylor*, 11 Sim. 178.

The courts in England have refused to interfere where the wife has unjustifiably deserted her husband, *Re Taylor*, 11 Sim. 178; where the mother has contracted extravagant habits, is without means of contributing to the child's support, and had married a second time, concealing the fact from the child's guardians, *Shilleto v. Collett*, 8 W. R. 683; or where there had been prior immorality on her part and there was want of *bona fides* in the application, where there was an alleged object in view and a probable chance of contamination, *Re Moore*, 11 Irish Com. Law Reports, 1.

They have removed the children from the father on the grounds of notorious immorality, *Wellesley v. Duke of Beaufort*, 2 Russ. 1; *Thomas v. Roberts*, 3 DeG. & Sim. 758; avowed infidelity, *Shelley v. Westbrook*, Jac. 266; infamous criminality though not followed by judicial conviction, *Anon*, 2 Sim. N. S. 54; cruelty and removal out of jurisdiction, *DeManneville v. DeManneville*, 10 Ves. 52; but have refused to do so on the ground of poverty, or of peculiar religious views, *Curtis v. Curtis*, 5 Jur. N. S. 114.

On the other hand, where the father had abandoned the care of the children to their aunt the guardian of their fortunes, and was himself in embarrassed circumstances, his application to have them returned to him was refused, *Lyons v. Blenkin*, Jac., 245.

The courts have refused to exercise jurisdiction in removing children from father and mother merely because it might be for the children's benefit, *Re Finn*, *supra*; *Curtis v. Curtis*, *supra*.

Where natural children had been provided for by the father and were under the care of a guardian appointed by him, the court did not debar the mother from access to the children, but referred to the master to ascertain what might reasonably be allowed, *Courtois v. Vincent*, Jac. 268.

For other cases on the subject see those referred to in the cases cited above.

CON. STAT. U. C. CAP. LXXXVIII.—AN ACT RESPECTING THE LIMITATION OF ACTIONS AND SUITS RELATING TO REAL PROPERTY.

XXXI. No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which by virtue of the provisions hereinbefore contained he might have made an entry or distress, or brought an action to recover the same, respectively, if he had been entitled at law to such estate, interest or right, in or to the same as he shall claim therein in equity. 4 W. 4, c. 1, s. 32.

XXXII. When any land or rent shall be vested in a trustee upon any express trust, the right of the *Cestui que* trust, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at, and not before, the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him. 4. W. 4, c. 1, s. 33.

XXXIII. In every case of a concealed fraud, the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at, and not before the time at which such fraud shall, or with reasonable diligence might have been first known or discovered. 4. W. 4, c. 1, s. 34.

XXXIV. Nothing in the last preceding clause contained shall enable any owner of lands or rents to have a

suit in equity for the recovery of such lands or rents, or for setting aside any conveyance of such lands or rents, on account of fraud against any *bona fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who, at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed. 4 W. 4, c. 1, s. 34.

XXXV. Nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of Equity in refusing relief on the ground of acquiescence, or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act. 4 W. 4, c. s. 35.

## APPENDIX OF FORMS.

## I.—BILLS.

*Address.*

1. To the Honourable the Judges of the Court of Chancery.

*Commencement of informations and bills.*

2. Informing sheweth unto your Lordships, the Honourable John Sanfield Macdonald, Her Majesty's Attorney General for Upper Canada, on behalf of Her Majesty.

3. Informing sheweth unto your Lordships, the Hon. J. S. M., Her Majesty's Attorney General for U. C., at and by the relation of A. B. of the City of Toronto, in the County of York, Esquire.

4. The Bill of Complaint of A. B., of the Township of Scarboro', in the County of York, yeoman, Sheweth.

5. Humbly complaining sheweth unto your Lordships, your complainant S. T. of the City of Toronto, in the County of York, merchant.

6. The Bill of Complaint of the Corporation of the Township of South Norwich, a corporation situate in the County of Oxford and Province of Canada, Humbly complaining sheweth unto your Lordships, your complainants the Corporation of South Norwich, as follows.

7. The Bill of Complaint of A. B., an infant within the age of twenty-one years by his next friend C. D., of the City of Toronto, in the County of York, merchant.

8. The Bill of Complaint of A. B., wife of C. B., of the City of Toronto, Esq., by her next friend X. Y., of the City of Toronto, Esq.

## 9. Foreclosure.

IN CHANCERY,

Between A. B.,.....Plaintiff.

and

C. D.,.....Defendant.

CITY OF TORONTO,

To the Honourable the Judges of the Court of Chancery.

The Bill of Complaint of A. B. of the City of Toronto, in the County of York, merchant.

SHEWETH,

1. Under and by virtue of an Indenture of Bargain and Sale by way of Mortgage bearing date &c., and made between the defendant C. D. of the first part, E. D. his wife (who became a party thereto for the purpose of barring her dower only) of the second part, and your complainant of the third part, your complainant is mortgagee of certain freehold property therein comprised and described as (*insert description of land as in mortgage deed*) for securing payment of the sum of \_\_\_\_\_ and interest thereon.

2. The time for payment has elapsed and no sum has been paid on account of principal but all interest has been paid up to the \_\_\_\_\_ day of \_\_\_\_\_.

3. There is now due under and by virtue of the said Indenture of mortgage for principal money the sum of \_\_\_\_\_, and for interest the sum of \_\_\_\_\_.

4. Your complainant has not been in occupation of the said mortgaged premises or of any part thereof.

5. The defendant C. D. is entitled to the equity of redemption in the said lands.

Your complainant therefore prays that he may be paid the said sum of \_\_\_\_\_, and interest thereon and the costs of this suit; and in default thereof that the equity of redemption in the said lands may be foreclosed. That for the purposes aforesaid all proper directions may be given and accounts taken, and that your complainant may have such further and other relief as may seem meet.

And your complainant will ever pray.

## 10. Foreclosure by Assignee—Prayer for Sale.

(Style of cause, &c.)

1. Under and by virtue of an Indenture of Mortgage bearing date &c. and made between the defendant C. D. of the first part and one X. Y. of the second part, and a transfer thereof by Indenture bearing date &c. and made between the said X. Y. of the first part and your complainant of the second part; your complainant is a mortgagee of certain freehold property therein comprised and described as (*insert description*) for securing payment of the sum of \_\_\_\_\_ and interest thereon.

2. The time for payment has elapsed and no sum has been paid on account of principal or interest.

3. There is now due upon the said mortgage for principal the sum of \_\_\_\_\_, and for interest the sum of \_\_\_\_\_.

4. Your complainant has not been in occupation of the said mortgaged premises or of any part thereof.

5. The defendant C. D. is entitled to the equity of redemption in the said lands.

Your complainant therefore prays :

1. That he may be paid the sum of \_\_\_\_\_ and interest thereon as aforesaid and the costs of this suit.
2. That in default thereof the said mortgaged premises may be sold and the produce thereof applied in or towards payment of the said debt and costs.
3. That the defendant C. D. may be ordered to pay the balance of the said mortgage debt and costs after deducting the amount realized by such sale.
4. That for the purposes aforesaid all proper directions may be given and accounts taken, and that your complainant may have such further and other relief as may seem proper.

And your complainant will ever pray.



11. *Foreclosure against purchaser of equity of redemption—Default in payment of interest.*

(Style of cause, &c.)

1. Under and by virtue of an Indenture of mortgage bearing date &c., and made between one X. Y. of the township &c., of the first part, S. Y. his wife (who became a party thereto for the purpose of barring her dower only) of the second part, and your complainant of the third part; your complainant is a mortgagee of certain freehold property therein comprised and described as (*insert description*) for securing payment of the sum of \_\_\_\_\_ and interest thereon payable half yearly on the \_\_\_\_\_ days of January and July in each and every year.

2. Default has been made in payment of the instalment of interest due on the \_\_\_\_\_ day of July, 186—, by reason whereof your complainant submits he is entitled to call in and have paid to him the whole of the money secured by the said mortgage and in default to a foreclosure.

3. No sum has been paid on account of the principal money, and there is due for principal money the sum of \_\_\_\_\_ and for interest the sum of \_\_\_\_\_.

4. Your complainant has not been in occupation of the mortgaged premises or of any part thereof.

5. By Indenture of Bargain and Sale bearing date &c., the said X. Y. conveyed absolutely to the defendant C. D. the said mortgaged premises and the said C. D. is now entitled to the equity of redemption in the said lands.

Your complainant therefore prays &c.

(Style of Cause, &c.)

12. *Foreclosure against widow and infant heirs of mortgagor,*

1. Under and by virtue of an Indenture by way of mortgage bearing date, &c., and made between one C. D. of the first part E. D., his wife (who became a party thereto for the purpose of barring her dower only) of the second part and your complainant of the third part. Your complainant is mortgagee of certain freehold property therein comprised and described as (*insert description*) for securing payment of the sum of \_\_\_\_\_ and interest thereon.

2. The time for payment has elapsed and no sum has been paid on account of principal, but the interest has been paid up to the \_\_\_\_\_ day of \_\_\_\_\_.

3. There is now due under and by virtue of the said mortgage for principal money the sum of ———— and for interest the sum of ————.

4. Your complainant has not been in occupation of the said mortgaged premises or of any part thereof.

5. Since the making of the said Indenture of mortgage, the said C. D. departed this life intestate, leaving him surviving the defendant E. D. his widow and the defendants T. D. & M. D. his only children and co-heirs at law, infants within the age of 21 years.

6. The defendants T. D. & M. D. are entitled to the Equity of redemption in the said lands and the defendant E. D. claims to be entitled to dower in the same.

Your complainant therefore prays &c.

### 13. For Redemption.

(Style of Cause, &c.)

1. Under and by virtue of an Indenture (or other document) bearing date, &c. and made between (parties) your complainant is entitled to the Equity of redemption in certain freehold property comprised being (insert description of property) which was originally mortgaged for securing the sum of ———— and interest thereon.

2. The defendant C. D. is now, by virtue of the said Indenture, dated the ———— day of &c., the mortgagee of the said lands and entitled to receive the principal money and interest remaining due upon the said mortgage.

3. Your complainant believes that the amount of principal money and interest now due upon the said mortgage is the sum of ———— or thereabouts.

4. Your complainant has made, or caused to be made, an application to the said C. D. to receive the said sum of ————, and any costs justly payable to him and to recover the said mortgaged property to your complainant upon payment thereof, and of any costs due to him in respect of the said security, but the said C. D. has not so done.

Your complainant therefore prays, that he may be let in to redeem the said mortgaged property, and that the same may be re-conveyed to him upon payment of the prin-

cipal money and interest and costs due and owing upon the said mortgage. That for the purposes aforesaid all proper directions may be given and accounts taken. And that your complainant may have such further and other relief as under the circumstances seem proper.

And your complainant will ever pray.

14. *For an account of the dealings of a partnership expired.*

(*Style of Cause, &c.*)

1. From the \_\_\_\_\_ day of \_\_\_\_\_ down to the \_\_\_\_\_ day of \_\_\_\_\_ your complainant and the defendant C. D. carried on the business of \_\_\_\_\_ in partnership under certain articles of co-partnership dated, &c., and made between, &c., (*or under a verbal agreement made, &c.*)

2. The said co-partnership was dissolved (*or expired*) on the \_\_\_\_\_ day of.

Your complainant therefore prays that an account of the partnership dealings and transactions between your complainant and the said C. D. may be taken, and the affairs and business of the said partnership wound up and settled under the direction of this honourable court, and for that purpose that all proper directions may be given and accounts taken, and that your complainant may have such further and other relief as may seem meet.

And your complainant will ever pray.

15. *For dissolution of partnership.*

(*Style of cause, &c.*)

1. Your complainant and the defendant C. D., are and have been since the \_\_\_\_\_ day of \_\_\_\_\_ co-partners in the trade or business of \_\_\_\_\_ under articles of co-partnership dated, &c., and

made between, &c. (or under a verbal agreement made, &c.) which partnership was to continue for \_\_\_\_\_ years (or for an indefinite time.)

2. The said business was carried on under the said agreement until \_\_\_\_\_ without any difficulty warranting dissolution.

3. From the last mentioned day until the present time the said C. D. has greatly misconducted himself in the said business, by removing the books of the co-partnership from the shop or counting-house of the firm and denying your complainant or debarring him from access thereto, by discharging the clerks and servants of the said firm and engaging others in his own interest in their room; by making false entries in the said books, or improperly keeping the same.

4. The said defendant has also used the name of the firm for his own private purposes and has applied the moneys of the partnership to his own individual use.

5. There is nothing in the said articles or agreement of co-partnership to justify such conduct on the part of the defendant.

6. Your complainant has made frequent applications to the said defendant to desist from such conduct and to act in accordance with the said agreement and with his duty as a partner, but without effect.

7. Your complainant, on the \_\_\_\_\_ day of \_\_\_\_\_ gave notice to the said defendant that the said partnership would be dissolved from the \_\_\_\_\_ day of \_\_\_\_\_.

Your complainant therefore prays that the said partnership may be dissolved, and that the accounts of the said business may be taken from the commencement thereof, and the affairs thereof wound up and adjusted.

And that your complainant may have such further and other relief as may to this honourable court seem meet.

#### 16. *Specific Performance—Written agreement.*

(*Style of cause, &c.*)

1. By an agreement dated the \_\_\_\_\_ day of \_\_\_\_\_ and signed by the defendant C. D. the said defendant contracted to

buy of your complainant (or to sell to him) certain freehold (or leasehold) property therein described or referred to, for the sum of——.

2. Your complainant has made or caused to be made to the said C. D. application specifically to perform the said agreement on his part, but he has not done so.

Your complainant therefore prays that the said agreement may be specifically performed, and for that purpose that all proper directions may be given, your complainant hereby offering to perform the said agreement on his part.

And, &c.

17. *Specific Performance—parol agreement and part performance.*

(*Style of cause, &c.*)

1. The defendant C. D. being or pretending to be seised in fee simple in possession of lot No. —, in &c., your complainant and the said C. D. on or about the —— day of —— entered into a verbal agreement for the purchase by your complainant of the said lot of land at or for the price or sum of —— payable &c. with interest, and upon payment thereof a proper conveyance was to be executed of the said premises free from incumbrances.

2. Your complainant was accordingly admitted and entered into possession of the said lot and has continued in possession thereof ever since and is still in possession thereof.

3. Your complainant has made divers and considerable improvements thereon and has paid the sum of ——, part of the said purchase money.

4. Your complainant submits that under the circumstances aforesaid the said agreement has been partly performed so as to entitle your complainant to a specific execution thereof.

5. Your complainant made and caused to be made frequent applications to the said C. D. for the purpose of obtaining a specific execution of the said agreement, but without effect.

Your complainant therefore prays that the said contract may be specifically performed by the said C. D., your complainant being ready and willing and hereby offering to perform the same in all res-

pects upon his part, and that your complainant may have such further and other relief as may seem proper. And &c.

18. *To stay waste.*

(*Style of cause, &c.*)

1. Your complainant is and has been from before the acts herein after complained of until the present time seised in fee simple (or as the case may be) under and by virtue of an Indenture &c., bearing date &c., and made between &c., of lot No. — &c.

2. The defendant C. D. is in possession of the said lot as tenant for a term of ——— years (or as the case may be) of your complainant under and by virtue of an Indenture of demise &c., bearing date &c., and made between &c.

3. The said defendant has since the ——— day of ——— committed waste upon the said lot by cutting down and removing from off the said lot and applying to his own use a large number of the timber and other trees standing, growing, and being thereon, and also by quarrying a large quantity of stone being on and part of the said lot and by pulling down &c. houses &c.

4. The defendant continues and threatens and intends to continue to commit such waste as aforesaid, and other waste and destruction on the said lot, although frequently requested by your complainant to desist therefrom.

Your complainant therefore prays that the said C. D. may be restrained by the order and injunction of this honourable court from committing such waste as aforesaid, or any other waste, spoil or destruction on the said premises, and may account for the waste already committed, and that your complainant may have further and other relief in the premises.

19. *To stay trespass in nature of waste.**(Style of cause, &c.)*

1. Your complainant was at the time of the acts hereinafter complained of and has been since up to the present time the owner in fee simple (or as the case may be) in possession of lot No. &c., under and by virtue of an Indenture &c., and made &c.

3. The defendant C. D. has from the \_\_\_\_\_ day of \_\_\_\_\_ until the present time continually trespassed upon the said lot by cutting down and removing from off the said lot and applying to his own use divers valuable timber and other trees which were growing standing and being on the said lot.

3. The defendant continues and threatens and intends to continue to trespass on the said lot in like manner although frequently requested by your complainant to desist therefrom.

Your complainant therefore prays that the said defendant may be restrained by the order and injunction of this honourable court from committing the acts aforesaid and other acts of a like nature, and may account for the value of the timber and other trees cut down, removed and applied to his own use as aforesaid, and that your complainant may have such further and other relief as may seem meet.

20. *Bill by person entitled to an equitable estate or interest and claiming to use the name of his trustee in prosecuting an action for his sole benefit.**(Style of cause, &c.)*

1. Under an Indenture dated, &c. and made between &c., your complainant is entitled to an equitable estate or interest in certain property therein described or referred to, and the defendant C. D. is a trustee for your complainant of the said property.

2. Your complainant being desirous to prosecute an action at law against \_\_\_\_\_ in respect of such property, has made, or caused to be made, an application to the said defendant to allow your complainant to bring such action in his name and has offered to indemnify the defendant against the costs of such action.



3. The said defendant refuses to allow his name to be used by your complainant for the purposes of the said action.

Your complainant therefore prays that he may be allowed to prosecute the said action in the name of the said defendant C. D. your complainant hereby offering to indemnify him against the costs of such action.

21. *Bill by a person entitled to have a new trustee appointed in a case where there is no power in the instrument creating the trust to appoint new trustees, or where the power cannot be exercised, and seeking to appoint a new trustee.*

*(Style of cause, &c.)*

1. Under an Indenture dated, &c. and made between, &c. (or the will of,) your complainant is interested in certain trust property therein mentioned or referred to.

2. The defendant C. D. is the present trustee (or the real or personal representative of the last surviving trustee) of such property.

3. There is no power in the said Indenture (or will, &c.) to appoint new trustees (or the power in said will, &c., to appoint new trustees cannot be exercised).

Your complainant therefore prays that new trustees may be appointed of the said trust property in the place of (or to act in conjunction with) the said C. D.

## II.—DEMURRERS.

22. *For want of parties.*

*(Style of cause, &c.)*

The Demurrer of the defendant C. D. to the Bill of Complaint of A. B., the above named plaintiff.

The defendant by protestation not confessing all or any of the matters or things in the plaintiffs bill of complaint contained to be true in such manner and form as the same are therein set forth and alleged doth demur to the said bill; and for cause of demurrer sheweth that it appears by the said bill that there are not proper

parties thereto, inasmuch as it appears upon the face of the said bill that the creditors of the said F. C. other than the said plaintiff, who executed the instrument or document in the bill mentioned, are necessary parties to the said bill by name, but yet the plaintiff, has not made the said creditors parties to the said bill by name. Whereupon, and for divers other good causes of demurrer appearing in the said bill, the defendant doth demur thereto and humbly demands the judgment of this honourable court whether he shall be compelled to make any further or other answer to the said bill, and prays to be dismissed with his costs and charges in this behalf most wrongfully sustained.

23. *For want of Equity.*

*(Style of cause.)*

This defendant by protestation, &c. (as in No. 22) ; and for cause of demurrer sheweth that the plaintiff hath not in and by his said bill made and stated such a case as entitles him in a Court of Equity to any relief against this defendant as to the matters contained in the said bill or any of such matters, whereupon and for divers other good causes of demurrer appearing in the said bill the defendant doth demur thereto and demands the judgment of this court whether he shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with his costs in this behalf most wrongfully sustained.

24. *For want of Equity and want of parties.*

*(Style of cause.)*

These defendants by protestation, &c., (as in No. 22), do demur thereto, and for causes of demurrer shew : That the said bill doth not contain sufficient matter of Equity whereupon this honourable court can ground any decree in favor of the said complainant or give the complainant any relief as against these defendants, and further that, it appears by the plaintiff's own shewing in the said bill that a personal representative (*as the case may be*) of G. H., deceased, in the said bill mentioned, is a necessary party to the said bill ; but yet the said complainant hath not made any such personal representative of the said G. H., deceased, a party to his said bill, and thereupon and for divers other good causes of demurrer in the said bill contained, these defendants do demand the judgment of this honourable court, whether they shall be compelled to make any further or other answer to the said bill, and they pray to be hence dismissed with their reasonable costs in this behalf most wrongfully sustained.

## III.—ANSWERS.

25. *Form of Answer—Ord. 12, s. 1.**(Style of cause.)*

The answer of C. D., one of the above named defendants, to the bill of complaint of A. B. the above named plaintiff.

In answer to the said bill, I, C. D. say as follows :—

1. I believe that the defendant E. F. does claim to have a charge upon the farm and premises comprised in the indenture of mortgage, of the \_\_\_\_\_ day of \_\_\_\_\_, in the plaintiff's bill mentioned:

2. Such charge was created by an indenture dated, &c., made between myself of the one part, &c.

3. To the best of my knowledge, remembrance and belief, there is not any one other mortgage, charge, or incumbrance affecting the aforesaid premises.

Such statements as are considered necessary or material are to be introduced with as much brevity as may consist with clearness; and where a defendant seeks relief under section 4 of Order XII., the answer is to ask the special relief to which he thinks himself entitled.

26. *Answer of Infants.**(Style of cause.)*

The answer, &c.

In answer to the said bill we C. D. and E. F. by X. Y., our guardian, say as follows :—

1. We say that we are infants within the age of 21 years.

2. We submit our rights and interests in the matters in question in this cause to the protection of this honourable court, and pray to be hence dismissed with our costs.

27. *Disclaimer.**(Style of Cause, &c.)*

1. By a certain Indenture bearing date &c., and made between myself of the one and \_\_\_\_\_ of another part, *(as the case may be)* in consideration of £ \_\_\_\_\_ I granted and released unto the said \_\_\_\_\_ all my right, title and interest of in and to the said *(subject matter of the suit)* and I say that since the said date I have not claimed or pretended to have or claim any interest in the said

\_\_\_\_\_ and I disclaim all right, title and interest therein and to any part thereof.

And I pray to be hence dismissed with my costs in this behalf most wrongfully sustained.

#### IV.—REPLICATION.

28. *Form prescribed by Ord. 18, s. 2.*

*(Style of cause.)*

The plaintiff in this cause joins issue with the defendant C. D. *(all the defendants who have answered,)* and will hear the cause upon bill and answer against the defendant E. F., *(all the defendants against whom the cause is to be heard upon bill and answer)* and on the orders to take the bill *pro confesso* against the defendant G. H., *(as the case may be.)*

#### V.—PETITIONS.

On petitions which require to be served, application must be made in chambers for a judge's fiat appointing the day on which the petition will be heard. If the petitioner intends reading any evidence, he must also endorse notice of doing so. (See page 130.)

*Judge's Fiat.*

*(Short style of cause.)*

Let all parties interested in the matter of the within petition attend before this honourable court *(or, the presiding judge in chambers)* on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ and let notice hereof be forthwith served.

Dated, &c.

[Signed.]

*Notice.*

Take notice that on the hearing of the within petition will be read the affidavit of A. B. *(or other document intended to be read)* filed on the \_\_\_\_\_.

Like pleadings, petitions must have the name and address of the solicitor filing them endorsed.

29. *Petition by solicitors for taxation of bill of costs.*

In Chancery.

In the matter of A. B. and E. B.,  
Solicitors of this honourable court.

To the honourable the Judges of the Court of Chancery.

The petition of A. B. of the City of Toronto, gentleman, and of E. B. of the same place, gentleman, solicitors of this honourable Court,

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Sheweth,

1. That your petitioners were employed by X. Y. as his solicitors in a certain suit wherein the said X. Y. was plaintiff and C. D. and E. F. were defendants.

2. On the ——— day of ——— last your petitioners delivered, as by affidavit appears, a bill of their fees, charges and disbursements in the said suit, which said bill was subscribed by your petitioners according to the statute in such case made and provided.

3. The said X. Y. has made no application to have the said bill taxed, although more than one month has elapsed since the said bill was so delivered.

4. No action at law has been brought by your petitioners in respect of their said bill and the same remains unpaid.

5. The only parties interested in the costs and disbursements in the said suit are your petitioners.

Your petitioners therefore pray,

1. That it may be referred to the master of this Court to tax to them their said fees, charges and disbursements, and that the said X. Y. may be ordered to pay the same to your petitioners immediately after such taxation and that the order to be made herein may contain all usual directions and that your petitioners may have such further and other relief as to your Lordship may seem meet.

And your petitioners will ever pray.

B. & B.

Solicitors in person.

30. *Petition for delivery and taxation of solicitor's bill.*

In Chancery.

In the matter of X. Y. a solicitor of this Court.

To the honourable the Judges of the Court of Chancery.

The petition of A. B. of the Township of London, in the County of Middlesex, Yeoman.

Sheweth,

1. Your petitioner employed the above named X. Y. to take and prosecute certain proceedings in this court against one C. D. at the suit of your petitioner.

2. Certain proceedings were taken by the said X. Y. in your petitioner's behalf.

3. Your petitioner on the day——— last obtained an order of this honourable court in the said suit, making T. W. a solicitor of this court, his solicitor in the place and stead of the said X. Y.

4. The said X. Y. hath not rendered to your petitioner a bill of his fees, charges and disbursements incurred and disbursed by him in carrying on the said suit, nor has he delivered over to your petitioner the papers and documents in his possession relating to the said suit.

5. Your petitioner is desirous that the said X. Y. should deliver to him a bill of his costs and that the same may be taxed by the proper officer of this court, your petitioner submitting to pay what upon such taxation shall be found due to the said X. Y.

Your petitioner therefore prays,

1. That the said X. Y. may be ordered to deliver to your petitioner a bill of his cost, charges and disbursements incurred and disbursed by him in the said suit, and that the same may be referred to the master of this court for taxation, and upon payment by your petitioner of what may be found to be due to the said X. Y. upon such taxation, or if it shall appear upon such taxation that the said bill is overpaid, that the said X. Y. may be ordered to deliver to your petitioner or to whom he may appoint, all papers writings and documents in his possession or power relating to the said suit, and that the said X. Y. may be ordered to refund and repay to your petitioner what shall appear to be due to him upon such taxation and that

the said order may contain all other necessary directions.

And your petitioner will ever pray.

31. *Petition for taxation of costs, not in any suit.*

In Chancery.

In the matter of X. Y., a solicitor of this Court.

To the honourable, &c.

The petition of A. B., of the Township of London, in the county of Middlesex, Yeoman.

1. Your petitioner employed the above named X. Y., of ——— as his solicitor, in certain conveyancing and other professional business.

2. The said X. Y., did on the ——— day of ———, deliver to your petitioner his bill of fees, charges and disbursements therefor, which as your petitioner is advised, contains many unreasonable and extravagant charges, and the same does not contain any item for business done in any of the courts of Law or Equity.

3. Your petitioner is desirous that the said bill may be taxed by the proper officer of this court, submitting to pay upon such taxation what shall be found due to the said X. Y.

Your petitioner therefore prays,

1. That the said bill may be referred to the master of this court for taxation, and upon payment by your petitioner of what may be found due to the said X. Y.—(proceed in the same manner as in the petition to tax the solicitor's bill *ante*.)

NOTE.—The three preceding forms it is conceived will sufficiently show what is necessary in petitions of this class, a petition in any case not exactly in point could easily be framed from them. At one time it was thought advisable that the prayer should be in conformity with the terms in which the orders are drawn up, and ask that no (or if proceedings at law have been begun, no further) proceedings at law might be taken, &c., but it is now held that the prayer for all usual directions is sufficient.

The petition is supported by an affidavit of the petitioner, which is a mere echo of it.

In some cases where a client wished to have his solicitor's bill taxed, the usual order has been granted on *præcipe*, but this is not, as yet, the settled practice. The various orders and notes on this subject contain all information as to costs



With regard to the last form, it ought to be borne in mind that the the Court of Queen's Bench in this country have decided that a bill of costs for conveyancing charges *only* cannot be referred to the Master for taxation, our statute only mentioning business done by an attorney and solicitor "as such." If, however, there is one taxable item, the whole bill will be referred to the Master. In neither of the two cases on which these decisions rest, *Re Lemon and Peterson*, 8 U. C. L. J. 185, and *ex parte Glass*, 9 U. C. L. J. 111, does the provision respecting taxation in cap. 91 of the Con. Stats. U. C. seem to have been referred to; and it is submitted that if the question ever comes up in the Court of Chancery, a contrary opinion might be arrived at.

### 32. *Petition to change solicitor.*

In Chancery.

(*Style of cause.*)

To the honourable, &c.

The petition of, &c.

1. Your petitioner employed A. B. of ———, as his solicitor in this suit, and your petitioner is now desirous to appoint X. Y. of ———, as his solicitor.

Your petitioner therefore prays :—

1. That he may be at liberty to appoint X. Y. as his solicitor in this suit, in the place and stead of A. B. his present solicitor.

And your petitioner, &c.

### 33. *Petition for re-hearing.*

In Chancery.

(*Style of cause.*)

1. A decree in this cause was pronounced by this honourable court on the ——— day of ———.

2. Your petitioner submits is advised and believes that the said decree is erroneous in substance—and that the same should be vacated and set aside or at least materially varied.

Your petitioner therefore prays :—

That the said decree may be vacated or varied as may seem just and that for such purpose this cause may be reheard before this honourable court.

And your petitioner, &c.

*Certificate of counsel thereon.*

We conceive this cause is proper to be re-heard touching the matter mentioned in this petition, if the court shall think fit.

A. B.

C. D.

*Consent of Petitioner.*

I agree for the purpose of obtaining a re-hearing of this cause to deposit ten pounds with the registrar, and to pay such costs, if any, as this court may award in respect of any proceedings had upon the decree made herein.

Witness.

*Fiat of Judge.*

Upon the petitioner depositing ten pounds with the registrar, and consenting to pay such costs as this court may award in respect of any proceedings had upon the decree in this cause, let the registrar set this cause down for re-hearing next after the causes already appointed.

It would be almost useless in cases of petitions under 12 Vic. c. 72, and of lunacy, to give a form of petition, seeing that the facts vary so much in each case. The two following forms are inserted, by request, more to show the general frame and requirements of such petitions than as forms.

*34. Petition under 12 Vic. Cap. 72, to have guardian assigned and land sold by private sale.*

In Chancery,

In the matter of A. L. an infant within the age of twenty-one years.

And in the matter of an act passed in the twelfth year of the reign of Her Majesty Victoria, and chaptered seventy-two.

To the honourable, &c.

The humble petition of A. L. of the parish of St. B. in the District of Montreal in that part of the Province of Canada formerly called Lower Canada an infant within the age of twenty-one years by B. L. her *Tuteur*.

Sheweth,

1. N. L. your petitioner's late father died intestate on or about the \_\_\_\_\_ day of \_\_\_\_\_ leaving him surviving your petitioner.

2. E. D. L. the mother of your petitioner departed this life previous to the death of the said N. L.

3. Your petitioner is now of the age of nine years.

4. Your petitioner's said father was at the time of his death entitled to the following lands (*as the case may be.*)

5. B. L. of the parish of——— in the District of Montreal has been appointed *Tuteur* to your petitioner in due course at law.

6. In the inventory and schedule hereunto annexed is set forth a statement of the personal property which belonged to your petitioner's father at the time of his death, and the prices for which the same were sold at public auction, also of the debts due to the estate of your petitioner's said father, and of the debts due by the said estate.

7. The amount of the said personal property and of the debts due to the said estate is insufficient to pay the claims against the said estate, and your petitioner has no means of paying the said debt except by selling the lands hereinbefore mentioned or part thereof.

8. The said lands are less beneficial to your petitioner than the produce thereof would be if the same were sold and converted into money and the proceeds invested for the benefit of your petitioner, inasmuch as your petitioner is unable to work the said lands and the highest rental which could be obtained for the same would be wholly insufficient for the payment of the said debts, and for the maintenance of your petitioner.

9. The said N. L. was not, at the time of his death, seised of, or entitled to any interest in any lands whatsoever, except those hereinbefore mentioned.

10. Your petitioner has been offered £——— for the said lands, which are as high prices as can in any way be obtained for the same, if sold at public auction.

11. Your petitioner proposes that the said lands should be sold to the persons offering to purchase the same, and your petitioner submits that there will thus be obtained a sum sufficient after paying off the claim against the said estate still unsatisfied to have a balance applicable to the support and maintenance of your petitioner.

12. Your petitioner therefore prays.

1. That the said B. L. may be assigned guardian by this honourable court to the person and estate of your petitioner.

2. That the interest of your petitioner in [the said lands may be sold in such manner and on such terms as this honourable court may think fit.

3. That the moneys realized by such sale may be invested for the benefit of your petitioner in such manner as this honourable court shall think fit to order.

4. That for the purposes aforesaid all proper directions may be given and accounts taken or that this honourable court may make such other orders in the premises as may seem meet.

And your petitioner will ever pray.

35. *Petition to have a person declared a lunatic and a committee appointed over his person and property.*

*In Chancery.*

In the matter of R. B., of the City of Toronto, in the County of York, baker.

And in the matter of an Act passed in the ninth year of the reign of Her Majesty, Queen Victoria, and chaptered ten.

And in the matter of an Act passed in the twentieth year of the reign of Her Majesty, Queen Victoria, and chaptered fifty-six.

To the honourable, &c.

The humble petition of T. L. B., of the City of Toronto, in the County of York, carpenter, sheweth :—

1. The above named R. B. who is your petitioner's father, on or about the ——— day of ———, became a lunatic as your petitioner is advised and doth verily believe, and he hath since the ——— day of ——— been an inmate of the Provincial Lunatic Asylum, at Toronto.

2. Before the said ——— day of ———, the said R. B. carried on the business of a baker, in the City of Toronto.

3. The said R. B. was on the said — day of —, and still is seised of or entitled to certain real estate, consisting of —

4. The said R. B. was not possessed of any personal property except the household furniture in his dwelling house on — Street, and the same is still in the said house and used by his wife and the other members of the family.

5. The said R. B. was not indebted to any person in any amount whatever, and there is no charge or incumbrance upon his real estate or any part thereof.

6. The rents of the said houses amounting to the sum of —, per annum, have since the said — day of —, been applied in payment of the sum of £—, charged for maintenance of the said R. B. in the said Asylum, and the remainder has been expended in the maintenance of his wife, and in the maintenance and education of his infant children.

7. The family of the said R. B. consists of his wife H. B., and his children, your petitioner, &c.

8. The said R. B. is wholly incapable of transacting any business or of managing his affairs and property, and your petitioner, and the other members of the family, are desirous that a commission of Lunacy should issue out of this honourable court, to enquire as to the alleged lunacy of the said R. B., or that he may be declared by the order of this honourable court to be a lunatic, and that some fit and proper person may be appointed committee of the person and estate of the said R. B.

9. Your petitioner therefore prays :—

1. That a commission of lunacy may issue under the seal of this honourable court to enquire as to the alleged lunacy of the said R. B., or

2. That the said R. B. may be declared by the order of this honourable court to be a lunatic.

3. That some proper person may be appointed committee of the person and estate of the said R. B.

4. That such other order may be made as may to this honourable court seem proper.

And your orator will ever pray :—

NOTE.—It has been thought best to pray for an order or a commis-

sion in the alternative. The petition on an application for an order has to be supported by affidavits stating facts, from which the Judge may draw his own conclusion. Affidavits by medical men ought to show the present condition of the patient, how long he has been afflicted, and how long, judging from the nature of the case, it will probably be, before he will be restored to health, or what the issue of the disease will be; mere opinions by them that the patient is a lunatic, however numerous and respectable, are useless.

The Committee is appointed in the usual way, see notes on Committee and Receivers.

#### VI.—NOTICES.

##### 36. *Of filing answer or demurrer.*

*(Short style of cause.)*

Take notice that the answer (or demurrer) of the defendant C. D. has this day been filed.

Dated, &c.

To E. F. Plaintiffs' Solicitor.

S. T. Defendants' Solicitor.

##### 37. *Of filing replication.*

*(Short style of cause.)*

Take notice that the plaintiff has this day filed the replication in this cause.

Dated, &c.

##### 38. *Of production.*

*(Short style of cause.)*

Take notice that the plaintiff (or defendant) has this day filed his affidavit on production of books and papers, and has deposited the document therein mentioned in the office of the registrar (or deputy registrar.)

Dated, &c.

##### 39. *To inspect papers produced.*

*(Short style of cause.)*

Take notice that I will attend at the registrar's office on ——— next, at ——— o'clock, to examine the books and papers produced by the defendant (or plaintiff.) Dated, &c.

##### 40. *Of examination.*

*(Style of cause.)*

To the above named defendant C. D.

Take notice that this cause has been set down for the examination of witnesses at ——— on the ——— day of

\_\_\_\_\_, at which time and place the witnesses for all parties must be examined. Dated, &c.

41. *Of Hearing.*

(*Style of cause.*)

To the above named defendants C. D. and E. F.

Take notice that this cause has been set down to be heard on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, and unless you attend at the time and place appointed a decree may be pronounced in your absence. Dated, &c.

42. *Of Examination and Hearing.*

(*Style of cause.*)

To the above named defendants.

Take notice that this cause has been set down for examination of witnesses and hearing, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, at which time and place the witnesses for all parties must be examined and the cause heard; and unless you then and there attend, a decree may be pronounced in your absence.

Dated, &c.

43. *Of Hearing on further Directions.*

(*Style of cause.*)

To the above named defendants.

Take notice that this cause has been set down to be heard on further directions (*and as to the matter of costs*) on \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, and unless you attend at the time and place appointed, a decree may be pronounced in your absence.

Dated, &c.

44. *Of settling minutes.*

(*Short style of cause.*)

Take notice that I will attend the registrar to settle the minutes of decree in this cause on \_\_\_\_\_ next at \_\_\_\_\_ o'clock, at his office in Osgoode Hall.

Dated, &c.

45. *Of passing decree.*

(*Short style of cause.*)

Take notice that I will attend the registrar to pass the decree in this cause on \_\_\_\_\_ next, at \_\_\_\_\_ o'clock, at his office in Osgoode Hall.

Dated, &c.

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## VII.—AFFIDAVITS.

46. *Of service of Office Copy Bill.**(Style of cause.)*

I, \_\_\_\_\_, of \_\_\_\_\_, in the County of \_\_\_\_\_ make oath say, that I did, on the \_\_\_\_\_ day \_\_\_\_\_ serve \_\_\_\_\_ the above-named defendant \_\_\_\_\_ with a paper which purported to be an Office Copy of the Bill filed in this cause, by delivering to and leaving with the said defendant at \_\_\_\_\_ in the County of \_\_\_\_\_, the said office copy. I further say, that upon \_\_\_\_\_ the said office copy there was a certificate to the effect that the original Bill in this Court had been filed at \_\_\_\_\_ on the \_\_\_\_\_ day of \_\_\_\_\_ which certificate purported to be signed by \_\_\_\_\_ registrar of the court (or deputy-registrar, &c., at \_\_\_\_\_,) and that each page of the said office copy was sealed with a seal similar to the one which I now look upon in the margin of this affidavit. I further say that upon \_\_\_\_\_ the said office copy at the time of the service thereof, there was endorsed the following memorandum—to wit:

## “NOTICE TO THE DEFENDANT WITHIN NAMED.

“Your answer is to be filed at the Office of

“You are to answer or demur within four weeks from the service hereof.

“If you fail to answer or demur within the time limited you are to be subject to have such Decree or Order made against you as the Court may think just, upon the plaintiff's own showing; and if this notice is served upon you personally, you will not be entitled to any further notice of the further proceedings in this cause.

“*Note.*—This Bill is filed by \_\_\_\_\_ of \_\_\_\_\_ in the County of \_\_\_\_\_, solicitor for the above-named plaintiff.”

“And I further say that to effect the said service I necessarily travelled \_\_\_\_\_ miles. Sworn &c.

47. *Affidavit of service of Notice of Motion.**(Style of cause.)*

I, A. B. &c.

1. I did on the \_\_\_\_\_ day of \_\_\_\_\_, serve personally the above named defendant C. D., with the notice of motion in this cause hereunto annexed by delivering to and leaving with the said C. D. a true copy thereof.

Sworn, &c.

48. *Of service of decree.*

(Style of cause.)

I, \_\_\_\_\_ of \_\_\_\_\_ in the County of \_\_\_\_\_ make oath and say :—

That I did, on the \_\_\_\_\_ day of \_\_\_\_\_, personally serve the above named \_\_\_\_\_ with the decree (or order) of this honourable court, made in this cause, bearing date, the \_\_\_\_\_ day of \_\_\_\_\_ under the seal of this honourable court, whereby it was ordered, that (*set out ordering part of decree or order*) by delivering to, and leaving with the said \_\_\_\_\_ a true copy of the said decree, and at the same time producing and shewing to him the said original decree duly passed and entered, on which copy, when so served as aforesaid, was endorsed a memorandum, in the words following : “If you, the within named \_\_\_\_\_ neglect to obey this decree (or order) by the time therein limited, you will be liable to be arrested by the sheriff, and you will also be liable to have your estate sequestered, for the purpose of compelling you to obey the same decree, without further notice.”

Sworn &amp;c.

49. *Of Service of Injunction.*

(Style of cause.)

I, A. B., &amp;c.

1. I did, on the \_\_\_\_\_ day of \_\_\_\_\_, serve personally the above named \_\_\_\_\_ with a true copy of the writ of injunction in this cause hereunto annexed, by delivering to and leaving the said copy with the said \_\_\_\_\_ at \_\_\_\_\_, in the County of \_\_\_\_\_

2. At the time of such service I exhibited to the said \_\_\_\_\_ the original writ of injunction in the cause, under the seal of this honourable court.

50. *Of service of Subpoena.*

(Style of cause.)

1. I did on the \_\_\_\_\_ day of \_\_\_\_\_ at \_\_\_\_\_ serve personally R. S. and F. G. named in the annexed writ of subpoena with the said annexed writ of subpoena in this cause, by delivering to and leaving with each of them the said R. S. and F. G., a true copy of the said subpoena, and I at the same time exhibited to each of them the original writ of subpoena, under the seal of this honourable court.

2. At the time of such service I paid to the said R. S. and F. G., each the sum of \_\_\_\_\_ as and for their witness fees in this cause.

Sworn, &amp;c.

51. *Of service of Petition.*

(Style of cause.)

1. I did on the \_\_\_\_\_ day of \_\_\_\_\_ serve personally the above named defendant R. S. with the petition in this cause now produced and shown to me, marked as exhibit A., by delivering to and leaving with the said R. S. a true copy thereof.

2. There was endorsed upon the copy of the said petition served therewith, a true copy of the judge's fiat endorsed upon the original petition in this cause..

Sworn, &amp;c.

52. *Of having been served with Notice of Hearing.*

(Style of cause.)

1. I am a clerk in the office of A. B., the defendant's solicitor in this cause.

2. The notice of hearing in this cause now produced and shown to me, marked as exhibit A., is the notice of hearing (or, of motion) which was served upon me in the office of the said A. B., on the \_\_\_\_\_ day of \_\_\_\_\_.

Sworn, &amp;c.

53. *To prove Bond Debt.*

(Style of cause.)

I, A. B. &amp;c.

1. C. D. the testator, (or intestate) in the pleadings in this cause mentioned, was in his life time and at the time of his death, and his estate still is, justly and truly indebted to me in the principal sum of \_\_\_\_\_ for money lent and advanced by me to the said testator, for securing the repayment whereof the said testator executed a certain bond or obligation in writing, dated the \_\_\_\_\_ day of \_\_\_\_\_, under the hand and seal of the said \_\_\_\_\_ whereby the said C. D. for himself, his heirs, executors, and administrators, became bound to me, my executors, administrators and assigns in the sum of \_\_\_\_\_, conditioned for the payment of the sum of \_\_\_\_\_, with interest for the same on the \_\_\_\_\_ day of \_\_\_\_\_, which said bond is now produced and shown to me and marked as exhibit A.

2. I have not, nor hath or have any person or persons by my order, or to my knowledge or belief for my use, received the said principal sum of \_\_\_\_\_ or any part thereof, or the interest which has accrued due thereon since the \_\_\_\_\_ day of \_\_\_\_\_, or any part thereof, or any security or satisfaction for the same respectively or for any part thereof, save and except the said bond.

3. The whole of the said principal sum of \_\_\_\_\_ together with interest thereon from the \_\_\_\_\_ day of \_\_\_\_\_ as afore-

said still remains justly due and owing to me under and by virtue of the said bond.

Sworn, &c.

54. *To prove bond debt, by personal representatives of bond creditor.*  
(Style of cause.)

We A. B. of &c., and C. B. of &c., severally make oath and say :—

1. We are the executors named in and appointed under the last will and testament of R. S. late of ———, farmer, deceased.

2. C. D. the intestate in the pleadings in this cause named, was in his life time, and at the time of his death, and his estate still is justly and truly indebted to us as such executors as aforesaid, in the principal sum of ———, with interest thereon from the ——— day of ———, under or by virtue of a certain bond or obligation in writing dated &c., under the hand and seal of the said C. D., whereby the said C. D., his heirs, executors, and administrators be bound to the said R. S., his executors, administrators, or assigns, in the sum of ———, conditioned for the payment of the sum of ——— with interest thereon on the ——— day of ——— which said bond is now produced and shown to us and marked as exhibit A.

3. We have not, nor hath either of us, to the knowledge or belief of the other, nor hath or have any other person by our order or the order of either of us, or to our knowledge or belief for our use or the use of either of us received, nor to our knowledge or belief did the said R. S. during his lifetime receive the said principal sum of ———, or any part thereof, or the interest which has accrued thereon, since the said ——— day of ——— or any part thereof, or any security or satisfaction for the same or for any part thereof, save and except the said bond.

4. The whole of the said principal sum of ——— together with interest thereon from the ——— day of ——— as aforesaid, still remains justly due and owing to us as such executors as aforesaid, under and by virtue of the said bond.

Sworn, &c.

55. *To prove debt on a promissory note.*  
(Style of cause.)

I, A. B. &c.

1. C. D. the testator in the pleadings in this cause named was in his life time, and at the time of his death, and his estate still is justly and truly indebted to me in the sum of ——— together with interest for the same, under and by virtue of a certain promissory note made by the said testator, and dated the ———

day of ———, for the sum of ——— and payable ——— months after the date thereof, to my order, which said promissory note is now produced and shown to me and marked as exhibit A.

2. I have not, nor hath or have any other person or persons by my order or to my knowledge or belief for my use, received the said sum of ——— or part thereof, or the interest thereon or any part thereof, or any security or satisfaction whatever for the same respectively or for any part thereof, save and except the said promissory note.

3. The whole of the said sum of ——— with interest thereon from the ——— day of ———, still remains justly due and owing to me under and by virtue of the said promissory note.

Sworn &c.

56. *To prove debt for goods sold and delivered.*

(*Style of cause.*)

1. R. S. late of ———, in the County of ———, the intestate in this cause named, was in his life time, and at the time of his death, and his estate still is justly and truly indebted to me in the sum of ———, for goods sold and delivered by me to the said R. S. in his lifetime, and for the prices marked and set forth in the paper writing hereunto annexed marked A.

2. The prices therein charged are fair and reasonable, and such as are usual or customary in the same trade or business.

3. I have not, nor hath or have any other person or persons by my order or to my knowledge or belief for my use received the said sum of ——— or any part thereof, or any security or satisfaction for the same or for any part thereof, but the whole of the said sum of ——— still remains justly due and owing to me upon the account aforesaid.

Sworn &c.

57. *To prove mortgage debt.*

(*Style of cause.*)

1. Under and by virtue of an indenture bearing date &c., and made between &c., I am mortgagee of the lands and premises therein comprised for securing payment of the sum of ———, together with interest thereon.

2. I have not, nor hath or have any other person or persons by any order, or to my knowledge or belief for any use received the said principal sum of ——— or any part thereof, or the interest which accrued due thereon since the ——— day of ——— or any

part thereof, or any security or satisfaction for the same respectively or any part thereof, save and except the said mortgage.

3. The whole of the said sum of ——— together with interest thereon, from the said ——— day of ———, still remains justly due and owing to me under and by virtue of the said mortgage.

4. I am not now, and never have been since the date of the said mortgage, nor hath or have any other person or persons by my order or to my knowledge or belief for my use, been in the occupation of the said mortgaged premises or of any part thereof, nor in receipt of the rents, issues or profits of the same or any part thereof.

58. *On production—Ord. 20, s. 2.*

*(Style of cause.)*

1. I have in my possession or power the documents relating to the matter in question in this suit set forth in the first and second parts of the first schedule hereto annexed.

2. I object to produce the said documents set forth in the second part of the said first schedule.

3. *(State upon what ground the objection is made and verify the fact as far as may be.)*

4. I have had, but have not now, in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto annexed.

5. The last mentioned documents were last in my possession or power on *(state when.)*

6. *(State what has become of the last mentioned documents, and in whose possession they now are.)*

7. According to the best of my knowledge, remembrance, information and belief, I have not now and never have had in my own possession, custody or power, or in the possession, custody or power of my solicitors or agents, solicitor or agent, or in the possession, custody or power of any other person on my behalf, any deed, account-book of accounts, voucher, receipt-letter, memorandum paper, or writing, or any copy of or extract from any such document, or any other document whatever relating to the matters in question in this suit, or any of them, or wherein any entry has been made relative to such matters, or any of them, other than and except the documents set forth in the first and second schedules hereto annexed.

Sworn, &c.

59. *Verifying account of personal estate.**(Style of cause.)*

We A. B. of &c., and C. D. of &c., and E. F. of &c., severally make oath and say as follows :

1. We have according to the best of our knowledge, remembrance, information and belief, set forth in the first schedule hereunder written a full, true and particular account and inventory of the personal estate of or to which — the testator in the decree dated — made in this cause named or referred to, and who died on the — day of —, was possessed or entitled at the time of his death, *(and not by him specifically bequeathed.)*

2. Save what is set forth in the said first schedule, *(and what is by the said testator specifically bequeathed,)* the said testator was not to the best of our knowledge, information, or belief at the time of his death possessed of or entitled to any debt or sum of money due to him from us, or any or either of us, on any account whatsoever, nor to any leasehold or other personal estate, goods, chattels or effects in possession or reversion, absolutely or contingently, or otherwise howsoever.

3. The said testators' funeral expenses have been paid and the same consist of the items of disbursement numbered — and — in the account hereinafter referred to.

4. We have in the account marked A. now produced and shown to us, according to the best of our knowledge, information and belief set forth a full, true and particular account of the personal estate of the said testator *(not by him specifically bequeathed)* which has come to our hands or to the hands of any person or persons by our or any or either of our order, or for our or any or either of our use, with the times when the names of the persons from whom, and on what account the same has been received, and also a like account of the disbursements, allowances, and payments made by us, or any or either of us in respect of or on account of the said testator's funeral expenses, debts and personal estate, together with the times when, the names of the persons to whom, and the purposes for which, the same were disbursed, allowed, or paid.

5. And we each speaking positively for himself, and to the best of his knowledge and belief as to other persons, further say, that save and except as appears in the said account marked A, we have not, nor hath any or either of us, nor have nor hath any other person or persons by our or any or either of our order, or for our of any or either of our use, possessed, received or got in any part of



the said testators' personal estate, nor any money in respect thereof, and that the said account marked A. does not contain any item of disbursement, allowance, or payment, other than such as has actually been disbursed, allowed or paid on the account aforesaid.

6. We further say, that to the best of our knowledge, information and belief, the personal estate of the said testator now outstanding or undisposed of consists of the particulars set forth in the second schedule hereunder written.

7. Save what is set forth in the said second schedule there is not, to the best of our knowledge, information or belief, any part of the said testator's personal estate now outstanding or undisposed of.

Sworn &c.

The first schedule above referred to.

£25 cash in the house.

£110 in the Bank of Toronto.

£80 debt due from R. O'Brien.

£80 promissory note of John Smith.

£400 due from R. Moore on bond.

£22 10s. debt due from David Kerr.

The second schedule above referred to (set out particulars in same manner as above.)

[For account see opposite page.]

*(Style of cause.)*

This account marked A. was produced and shewn to A. B., C. D. and E. F., and is the account referred to in their affidavit, sworn this — day of —, before me. X. Y.

No. of Ac't.	Date.	RECEIPTS.				DISBURSEMENTS.		
1	1862. May 1.	Found in house.	£20 0 0	1	1862. May 7.	John Rosa.	Undertakers Bill	£27 10 0
2	"	B'k of Toronto. Cash in Bank.	110 0 0					
3	June 4.	John Smith. Proms'ry Note.	50 0 0	2	" 15.	Surrogate Clerk.	Probate of Will.	5 7 6
4	June 10.	R. Moore. Bond Debt.	400 0 0	3	June 16.	Dr. Bell.	Medical attend- ance.	15 0 0
5	Oct. 3.	David Kerr. Debt due testa- tor.	52 10 0	4	July 9.	Wood & Co.	Promiss'y Note.	175 0 0

60. *Verifying account of Real Estate.**(Style of cause, &c.)*

1. We have, according to the best of our knowledge, remembrance and belief, set forth in the schedule hereunder written, the particulars of all the real estate which the testator in the decree, dated &c., made in this cause named or referred to, and who died on the——day of———was seised of or entitled to at the date of his will and at the time of his death.

2. Save what is said forth in the said schedule the testator was not to the best of our knowledge, information or belief, at the date of his will or at the time of his death seised of or entitled to any real estate in possession, remainder or reversion absolutely, contingently or otherwise howsoever.

3. We have according to the best of our knowledge, information and belief, set forth in the schedule hereunder written, the particulars of all the incumbrances affecting the said testator's real estate and what part thereof such incumbrances respectively affect.

4. We have in the account marked B., now produced and shown to us, according to the best of our knowledge, information and belief, set forth a full, true and particular account of all the rents and profits of the said testator's real estate which have come to our hands or to the hands of any or either of us, or to the hands of any person or persons by our or any or either of our order, or for our or any or either of our use, and the times when, the names of the persons from whom, on what account, in respect of what part of such estate the same have been received, and the times when the same became due, and also a like account of the disbursements, allowances, and payments made by us or any or either of us in respect of the said testator's real estate, or the rents and profits thereof, and the times when, the names of the persons to whom, and the purposes for which the same were made.

5. We each speaking positively for himself, and to the best of his knowledge and belief as to other persons, say that save and except appears in the said account marked B., we have not or hath any or either of us, nor hath nor have any other person or persons by our or any or either of our order or for our or any or either of our use, possessed, received or got in any rents or profits of the said testator's real estate nor any money in respect thereof, and that the said account marked B. does not contain any item of disbursement, payment or allowance other than such as has actually been disbursed, paid or allowed as above stated.

Sworn &c.

61. *Verifying Receiver's Account.*

I \_\_\_\_\_ of \_\_\_\_\_ the Receiver appointed in this cause make oath and say

1. I say that the account now produced and shown to me marked with the letter A., purporting to be my account of *(the rents and profits of the real estate and of the outstanding personal estate of A. B. the testator in this cause)* from the \_\_\_\_\_ day of \_\_\_\_\_ 186 \_\_\_\_\_ to the \_\_\_\_\_ day of \_\_\_\_\_ 186 \_\_\_\_\_ both inclusive, contains a true account of all and every sum and sums of money received by me or by any other person or persons by my order, or to my knowledge and belief to my use, on account or in respect of *(the said rents and profits accrued due on or before the said last mentioned day or on account or in respect of the personal estate)* other than and except what is included as received in my former accounts sworn to by me.

2. The several sums mentioned in the said account hereby verified to have been paid and allowed, have been actually and truly so paid and allowed in the manner and for the purposes specified in the said account.

3. And I say that to the best of my knowledge and belief, the said account is just and true in all and every the items and particulars therein contained.

62. *Of publication of advertisement.*

*(Style of cause, &c.)*

1. The advertisement hereunto annexed marked A., appeared in the issues of the newspaper called the *Globe* published in the City of Toronto of the \_\_\_\_\_ days of the month of \_\_\_\_\_ last and of the \_\_\_\_\_ days of the present month, being once in each week of the *four weeks* preceding the \_\_\_\_\_ day of \_\_\_\_\_.

(If the affidavit is made by the printer and publisher (this advertisement ought to be preceded by a clause stating that fact) if by another person by a clause stating that he has searched the files of the paper.)

63. *Of Auctioneer—sale under decree.*

*(Style of cause, &c.)*

1. At the time and place mentioned and under the conditions of sale specified in the annexed particulars and conditions of sale in this cause, I offered for sale by public auction the lands and premises described in the said annexed particulars of sale.

2. At the said sale, J. A. bid for the said lands the sum of—— and being the highest bidder therefor, became and was declared to be the purchaser thereof at the price or sum of——.

3. The said sale was conducted by me in a fair open and candid manner and according to the best of my skill and judgment.

4. The paper hereunto annexed marked exhibit B. is the contract of sale signed by the said J. A.

64. *For Guardian.*

1. I knew the late J. U. of the city of Toronto, carpenter, in the bill of complaint in this cause named.

2. The said J. U. departed this life some time in the month of ———, 186—, leaving him surviving the above named defendant M. U., his widow, and the defendants J. U., L. U., and S. U., his children and heirs-at-law.

3. The said J. U., L. U., and S. U., are all infants within the age of 21 years, and of the ages of six, four, and one years respectively, and are at present residing with and under the care of their mother, the said defendant M. U. at ———.

65. *For Commission.*

1. I am the plaintiff in this cause.

2. A. B. now residing at the city of Glasgow in that part of the United Kingdom of Great Britain and Ireland called Scotland, is a necessary and material witness for me in this cause, and it would be unsafe for me to go down to hearing without his evidence.

3. This application for a commission to take the evidence of the said A. B. is made in good faith and not for the purpose of delay.

66. *For Writ of Arrest.*

1. C. D. of ———, is justly and truly indebted to me in the sum of (at least \$100) for (state shortly upon what the equitable claim is founded).

2. I believe the said C. D. intends to quit Upper Canada with intent to defraud me in the said just debt, and I ground my said belief on the following facts (here state shortly all the facts in the applicant's knowledge justifying the application).

3. No action at law nor any suit in this honourable court has been brought or instituted for the recovery of the said debt.

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67. *Of plaintiff for final order of Foreclosure.*

1. I have not nor hath nor have any person or persons by my order, or to the best of my knowledge, information and belief for my use, received the sum of ———, being the amount found due to me by the report of the master at ——— in this cause, or any part thereof, or any security or satisfaction for the same or for any part thereof, but the whole of the sum of \$—— remains justly due and owing to me under the mortgage security in question in this cause.

2. I am not now, and since the date of the said mortgage, never have been, nor hath nor have any person or persons by my order or for my use, been in possession of the lands and premises comprised in the said mortgage, or of any part thereof, nor in receipt of the rents, issues and profits of the same or of any part thereof.

68. *Of Execution.*

1. On the ——— day of ——— I was present and did see A. B., manager of the Branch or Agency of the ——— Bank at ———, sign the certificate hereunto annexed at ———, in the county of ———.

2. The name "A. B." subscribed thereto is the proper handwriting of the said A. B., and the name "C. D." subscribed as witness is my handwriting.

69. *Of justification by sureties.*

We, A. B. of the City of Toronto, in the County of York, hotel-keeper, and C. D. of the same place, accountant, severally make oath and say :—

1. And first, I, the said A. B., for myself say that I am worth the sum of £—— after all my debts are paid.

2. And I, the said C. D., for myself say that I am worth the sum of £—— after all my debts are paid.

## VIII.—JURATS.

70. *To Answer.*

The defendant C. D., on the ——— day of ———, A. D. ———, appeared before me at my chambers in ———, in the County of ——— and signed the foregoing answer in my presence, and thereupon was sworn before me that he had read the said answer and knew the contents thereof, and that the same was true of his own knowledge except as to matters which are therein stated to be upon his information and belief, and as to those matters he believed it to be true.

71. *To Answer, in the case of an illiterate person.*

The defendant C. D. not being able to read or write, E. F., solicitor (or clerk to the solicitor) for the said defendant, was sworn before me at my chambers in ———, in the County of ———, on the ——— day of ———, A. D. ———, that he had truly and faithfully read the contents of this answer to the said C. D., and that he appeared perfectly to understand the same; and the said C. D. was thereupon sworn that he heard the said answer subscribed by him with his mark read over to him by the said E. F., and that he knew the contents thereof, and that the same was true of his own knowledge, except as to matters which are therein stated to be on his information, and as to those matters he believed it to be true.

72. *To affidavit.*

Sworn before me at ———, in the county of ———, on the ——— day of ———, having been first read over to the deponent C. D. whom I informed that he was liable to cross-examination as to its contents, and at liberty to add to or vary the same.

73. *To affidavit in case of illiterate person.*

Sworn before me at ———, in the County of ———, on the ——— day of ———, having been first read over to the deponent C. D. who seemed perfectly to understand the same, and who made his mark thereto in my presence, and whom I informed that he was liable to cross-examination as to its contents and at liberty to add to or vary the same.

74. *Short form of Jurat.*

Sworn before me at ———, in the county of ——— on the ——— day of ——— A. D.

## IX.—NOTICES OF MOTION.

75. *For Decree.*

In Chancery,

Between A. B.....Plaintiff.  
and  
C. D.....Defendant.

Take notice that this honourable court will be moved on behalf of the plaintiff on ———, the ——— day of ———, at ten o'clock in the forenoon, or so soon thereafter as Counsel can be heard for a decree or decretal order, in accordance with the prayer of the plaintiff's bill, or that such other decree or order may be made as to



this honourable court shall seem meet. And take notice that in support of such motion will be read the plaintiff's bill, (the answer of the said defendant, or such part thereof as the plaintiff shall be advised to read) and the affidavits mentioned below, this day filed, and the exhibits therein referred to.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1861.

To

E. F.,  
Deft's Sol.

Yours, &c.,

X. Y.,  
Plff's Sol.

The following affidavits will be read :

Affidavit of

Affidavit of

#### 76. *For Injunction.*

(*Style of cause.*)

Take notice &c., (as in No. 75) that an injunction may be awarded against the said defendant restraining him (state so much of the prayer of the bill as prays an injunction.)

And take notice that upon and in support of such motion will be read the plaintiff's bill filed in this cause, and the affidavit of &c. this day filed.

Dated, &c.

#### 77. *To dissolve injunction.*

(*Style of cause.*)

Take notice, &c., (as in No. 75) for an order that the injunction awarded in this cause to the above named plaintiff, on the \_\_\_\_\_ day of \_\_\_\_\_, may be dissolved, or that the terms of the said injunction may be varied, or that such other order may be made as to this honourable court may seem meet.

And take notice, &c.

#### 78. *For Receiver.*

(*Style of cause.*)

Take notice, &c., (as in No. 75) that it may be referred to the master to appoint a fit and proper person to receive the rents and profits of the estate in the pleadings mentioned, and to allow him a salary for his care and pains, the person to be appointed first giving security to be approved of by the master, duly to account for and to pay what he shall receive, and that the tenants may attend and pay their rents in arrear and their growing rents, to such receiver ;

and that he may be at liberty to manage, as well as set or let the said estate with the approbation of the said master, and that he may pass his accounts, and pay in his balance from time to time as the said master shall direct.

And take notice, &c., (as in No. 75.)

Dated, &c.

79. *Appeal from Master's Report.*

(*Style of cause.*)

Take notice, &c., (as in No. 75) by way of appeal from the report of the master made in this cause on the — day of — for the following amongst other reasons :

1. For that the said master, in and by his said report, &c., (*set out clearly and concisely the grounds of appeal.*)

And take notice that upon and in support of such motion will be read the pleadings, decree, master's report, affidavits, depositions, and other proceedings filed and taken in the office of the said master, upon the reference to him in this cause.

Dated, &c.

80. *For order pro confesso.*

(*Style of cause.*)

Take notice that a motion will be made on behalf of the plaintiff, before the presiding judge in chambers, on — the — day of —, at ten o'clock in the forenoon, or so soon thereafter as the motion can be made for an order that the plaintiff may be at liberty forthwith to set this cause down to be heard, in order that the bill may be taken *pro confesso* against you. And take notice that upon such motion will be read the affidavit of service of an office copy of the said bill upon you, and the registrar's (or deputy registrar's) certificate of no answer being filed.

Dated, &c.

81. *For guardian ad litem.*

(*Style of cause.*)

Take notice, (as in No. 75) for an order that one of the solicitors of this honourable court may be assigned as guardian to the above named defendant C. D., by whom he may answer the plaintiff's bill of complaint, and defend this suit.

And take notice that upon such motion will be read the plaintiff's bill of complaint and affidavit of service thereof, and the affidavits of A. B. and C. D. this day filed.

Dated, &c.

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82. *To dismiss for want of prosecution.*

(Style of cause.)

Take notice, (as in No. 75) on behalf of the defendant E. F., for an order that the plaintiff's bill may be dismissed out of this court, as against the above defendant E. F., for want of prosecution, with costs to be taxed by the master of this court.

And take notice that upon such motion will be read the notice of filing the answer of the said defendant, an admission of the service thereof, and the registrar's certificate of the state of the cause.

Dated, &amp;c.

83. *For leave to amend.*

(Style of cause.)

Take notice, &c., (as in No. 75) for an order that the plaintiff may be at liberty to amend his bill of complaint in this cause by (set out proposed amendments or refer to them as annexed.)

And take notice that upon and in support of such motion will be read the bill of complaint in this cause, the proposed amendment and the affidavit of A. B. this day filed.

Dated, &amp;c.

84. *For a commission to examine witnesses.*

(Style of cause.)

Take notice (as in No. 75) on behalf of the plaintiff, for an order that a commission may issue in this cause for the examination of A. B. and C. D. at ——— in ———, as witnesses in this cause on behalf of the above named plaintiff.

And take notice that in support of such motion will be read the affidavits of E. F. and G. H., this day filed.

Dated, &amp;c.

85. *For leave to examine de bene esse.*

(Style of cause.)

Take notice, (as in No. 75) on behalf of the plaintiff, for an order for the examination *de bene esse* of A. B. of ———, as witness in this cause, on the ground that he is a material and necessary witness for the ———, and that he is about to leave the Province, (or over 70 years of age.)

And take notice that in support of such motion will be read the affidavit of C. D. and E. F. this day filed.

Dated, &amp;c.

86. *To open biddings.**(Style of cause.)*

Take notice, &c., (as in No. 75) that A. B. of &c., may be at liberty to open the biddings as to lot ———, upon an advance of £ ———, upon the sum of £ ——— (the amount for which the lot was sold) upon payment of the purchaser's costs, charges, and expenses of, and occasioned by his said bidding, and that thereupon it may be referred to the master to settle an advertisement for the re-sale of the said lot. And take notice, &c.

Dated, &c.

87. *For vesting order.**(Style of cause.)*

Take notice, (as in No. 75) on behalf of ———, for an order in pursuance of the sixty-third section of the twelfth chapter of the consolidated statutes of Upper Canada, vesting in the said ——— the lands and premises purchased by him at the sale in this cause, on the ——— day of ———, being the lands described as Lot ———, in the particulars of sale in this cause.

And take notice that on such motion will be read the report of the master, confirming the said sale filed on the ——— day of ———

Dated, &c.

88. *To substitute sub-purchaser.**(Style of cause.)*

Take notice &c. (as in No. 75), for an order that the said C. J. C. may be substituted as the purchaser of the parcel of land in the particulars of sale in this cause described as lot No. —, in the place of G. S. M. the purchaser thereof at the sale in this cause.

And take notice that in support of such motion, will be read the master's report approving of the said sale and the affidavit of G. S. M., this day filed.

Dated &c.

89. *For Delivery of Possession.**(Style of cause.)*

Take notice &c., (as in No. 75), for an order that the defendant C. D. may deliver up possession of the lands and premises in question in this cause, being &c., within fourteen days after service, or within such other time as the presiding judge may direct, and may be ordered to pay the costs of this motion.

And take notice that upon and in support of such motion will be read the final order of foreclosure in this cause, and the affidavit of &c., this day filed.

Dated &c.

90. *To compel payment of purchase money into Court by purchaser under Decree and resale on default.*

(*Style of cause.*)

Take notice (as in No. 75), for an order that A. B. do, within a time to be limited by the presiding judge, pay into this Court to the credit of this cause, the sum of £——, being the balance of purchase money due from him for lands purchased by him at the sale of lands in this cause on the —— day of ——, and also interest on the said sum from the time when the said purchase money was payable by the conditions of sale in this cause, and that in default of the said A. B. paying such balance of purchase money and interest, by the time appointed by the said judge, that the lands purchased by the said A. B. may be re-sold, and the said A. B. ordered to pay the costs of such re-sale, the deficiency if any thereon and also the costs of this motion.

And take notice that upon such motion will be read the report of the master of this court at London confirming the said sale, dated the —— day of ——, and filed the —— day of ——, and the certificate of the registrar of non-payment by the said A. B.

Dated &c.

91. *For payment of money out of Court.*

(*Style of cause.*)

Take notice &c., (as in No. 75), for an order that out of the moneys now in Court to the credit of this cause the following sums may be paid: 1. To the plaintiff the sum of ——, being the amount reported due to him by the master's report made in this cause and dated the —— day of ——. 2. To the defendant C. D. the sum of ——, being the amount reported due to him by the master's said report.

And take notice that upon such motion will be read the master's report made in this cause and the registrar's certificate of the amount in court to the credit of this cause.

Dated &c.

92. *For administration order, Ord. XV.*

In the matter of the estate of E. F., late of the Township of Vaughan, in the County of York, deceased.

A. B. against C. D.

To C. D., Executor of E. F. deceased.

Take notice that A. B. of the city of Toronto, in the County of York, Esquire (or other proper description of the party), who claims to be a creditor upon the estate of the above named E. F. will apply to one of the judges of the Court of Chancery at Osgoode Hall, in the city of Toronto, on the \_\_\_\_\_ day of \_\_\_\_\_, at the hour of \_\_\_\_\_, for an order for the administration of the estate, real and personal, of the said E. F., by the Court of Chancery.

NOTE.—If you the above named C. D. do not attend either in person or by your solicitor at the time and place above mentioned, such order will be made in your absence as the judge may think just and expedient.

Dated &c.

G. H.,

Of the city of Toronto, solicitor for the above named A. B.

## X.—APPOINTMENTS.

93. *Appointment, Ord. 34, s. 4.*

(Style of cause.)

I hereby appoint \_\_\_\_\_ the day \_\_\_\_\_ to proceed (*state nature of business for which appointment was made*) when all parties are to attend at chambers in Osgoode Hall, in the City of Toronto, at the hour of \_\_\_\_\_.

(Signature of Judge.)

NOTE.—If you do not attend either in person or by your solicitor, at the time and place above mentioned, such order will be made and proceedings taken in your absence, as the judge may think just and expedient.

G. H. Solicitor for \_\_\_\_\_.

94. *Special Examiner's or Deputy Master's appointment for examination of witnesses.*

(Short style of cause.)

I hereby appoint \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_, at the hour of \_\_\_\_\_, for the examination of witnesses herein at my office in \_\_\_\_\_.

Dated &c.

95. *To settle minutes.**(Short style of cause.)*

I hereby appoint — the — day of — to settle the minutes of decree in this cause at my office in Osgoode Hall.

Dated &c.,

96. *To pass Decree.**(Short style of cause.)*

I hereby appoint — the — day of — to pass the decree in this cause at my office in Osgoode Hall.

Dated, &c.

97. *Master's Warrant.**(Short style of cause.)*

By virtue of an Order of Reference, I do appoint to consider of the matters thereby to me referred, on — next, at — of the clock in the — noon, at my Chambers in —, at which time and place all parties concerned are to attend.

Dated the — day of —, A. D. 186—.

98. *Master's general Warrant.**(Short style of cause.)*

By virtue of an order or decree of reference, I do appoint the several days and times hereunder written for the several purposes also hereunder written, at my chambers in —, at which time and place all parties concerned are to attend.

Dated the — day of —, A. D. —.

99. *Master's notice, A.**(Style of cause.)*

Whereas a suit has been instituted by the within named complainant for the foreclosure (or sale) of certain lands, being (*insert description of lands*) and I have been directed to enquire whether any other person other than the plaintiff, has any charge, lien, or incumbrance upon the said estate. And whereas it has been made to appear before me that you have each some lien, charge, or incumbrance upon the said estate, and I have therefore caused you each to be made a party to this suit, and appointed the — day of —, at — o'clock in the — noon, for you to appear before me, either in person or by your solicitor, to prove your claims,



Now you are hereby required to take notice : 1st. That if you wish to apply to discharge my order making you a party, or to add to or vary the within decree, you must do so within fourteen days from the service hereof ; and if you fail to do so, you will be bound by the decree and the further proceedings in this cause as if you were originally made a party to the suit. 2nd. That if you fail to attend at my chambers at —, in —, at the time appointed, you will be treated as disclaiming all interest in the property in question, and it will be disposed of in the same way as if you had no claim thereon, and your claim will be in fact foreclosed by such non-attendance.

*Master.*

To —.

100. *Master's notice, B.*

*(Style of cause.)*

Having been directed by the decree in this cause, to enquire whether any person other than the plaintiff has any lien, charge, or incumbrance upon the lands in the pleadings mentioned, being *(insert description of land.)* I do hereby appoint the — day of — next, at — o'clock, in the — noon, at my chambers at —, in —, to proceed with the said enquiries.

And you are hereby required to take notice :

That if you fail to attend at the time and place appointed, you will be treated as disclaiming all interest in the land in question, and it will be dealt with as if you had no claim thereon, and your claim will be in fact foreclosed.

*(Signed)*

*Master.*

101. *Bond on appeal to Court of Error and Appeal—Given in Orders.*

Know all men by these presents that we, A. B. of —, C. D. of —, and E. F. of —, are jointly and severally held and firmly bound unto G. H. of —, in the penal sum of — lawful money of Canada, for which payment well and truly to be made, we bind ourselves, and each of us by himself, our, and each of our heirs, executors and administrators respectively, firmly by these presents.

Witness our hands and seals respectively, the — day of —, in the year of our Lord —.

Whereas the (appellant) alleges and complains that in the giving of judgment in a certain suit in Her Majesty's Court of Queen's

Bench (or the Court of Common Pleas, as the case may be), in Upper Canada, between (the respondent) and (the appellant) in a plea of ———, manifest error hath intervened, wherefore the said (appellant) desires to appeal from the said judgment to the Court of Error and Appeal.

Now the condition of this obligation is such, that if the said (appellant) do and shall effectually prosecute such appeal, and pay such costs and damages as shall be awarded, in case the judgment aforesaid to be appealed from shall be affirmed or in part affirmed, then this obligation shall be void, otherwise it shall remain in full force.

Signed, sealed and delivered  
in the presence of

102. *Affidavit of justification—Form given in Orders.*

In the (style of court).

A. B.,.....Plaintiff.

vs.

C. D.,....Defendant.

E. F. of ———, and G. H. of ———, severally make oath and say:—

1st. This deponent E. F. for himself saith, that he is a resident inhabitant of Upper Canada, and is a householder in (or a freeholder in), ———, and that he is worth the sum of (the sum in which he stands bound by the penalty) over and above what will pay all his debts.

2nd. And the deponent G. H., for himself saith, that he is a resident inhabitant of Upper Canada, and is a householder in (or freeholder in), ———, and that he is worth the sum of (as the case may be) over and above what will pay all his debts.

Sworn by the above named deponents, } (Signed) E. F.  
at ——— this ——— day of ——— before me. } G. H.

X. Y.,

A Commissioner, &c.

103. *Bond on appeal to the Privy Council.*

Know all men by these presents, that we, A. B. of ———, C. D. of ———, and E. F. of ———, are jointly and severally held and firmly bound unto G. H. of ———, in the penal sum of ———, of lawful money of Canada, for which payment well and truly to be made, we bind ourselves, and each of us by himself, our, and each of our heirs, executors and administrators respectively, firmly by these presents.

Witness our hands and seals respectively the —— day of ——, in the year of our Lord ——.

Whereas (the appellant) alleges and complains, that in the giving of judgment in a certain suit in Her Majesty's Court of Error and Appeal in Upper Canada, between (the respondent) and (the appellant) —— manifest error hath intervened; wherefore the said (appellant) desires to appeal from the said judgment to Her Majesty, in Her Majesty's Privy Council.

Now the condition of this obligation is such, that if the said (appellant) do and shall effectually prosecute such appeal and (or) pay such costs and damages as shall be awarded, in case the judgment aforesaid to be appealed from, shall be affirmed, or in part affirmed, then this obligation shall be void, otherwise shall remain in full force.

104. *Recital and condition of Bond on appeal from County Court.*

Whereas an order (or decree) was pronounced in a certain cause of A. B. plaintiff, and C. D. defendant, depending in the County Court of the County of Middlesex, and the said A. B. (or C. D.) intends to appeal therefrom to the Court of Chancery for Upper Canada.

Now the condition of the above written obligation is such, that if the said A. B. (or C. D.) do and shall well and effectually prosecute such appeal in the said court, and pay such costs and damages as shall be awarded in case the said order (or decree) shall be affirmed or in part affirmed, then this obligation to be void, &c.

NOTE.—The Bond is to be made to the respondent in the sum of £20, executed by the appellant and two sufficient sureties, see pages 25, 26. The form of Bond and affidavit of justification to the Court of Error and Appeal with slight variations would be suitable.

105. *Bond for security for Costs.*

IN CHANCERY,

(*Style of cause, &c.*)

Know all men by these presents that I, J. Y. of ——, farmer, am held and firmly bound to A. G., Esquire, Registrar of the Court of Chancery for Upper Canada, in the penal sum of £—— of good and lawful money of Canada, to be paid to the said A. G. or his certain attorney, executors, administrators or assigns, for which payment to be well and faithfully made I bind myself my heirs, executors and administrators firmly by these presents, sealed with my seal and dated this —— day of ——, in the twenty—— year of

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the reign of Our Sovereign Lady Queen Victoria, and in the year of our Lord 186—.

Whereas A. B. and C. D. have lately exhibited their bill of complaint in the said Court of Chancery against E. F. and G. H. defendants touching the matters therein contained.

Now the condition of the above written obligation is such, that if the above bounden J. Y., his executors or administrators, do and shall well and truly pay or cause to be paid to the said (*if the bond be given to all the defendants, "to the defendants in the said cause"*), all such costs as the said court shall think fit to award to the said defendant (*or "or to any or either of them"*) in the said cause, then the above written obligation to be void, &c.

#### 106. Receiver's Recognizance.

A. B. of———C. D. of———and E. F. of———before our Sovereign Lady the Queen in her Court of Chancery for Upper Canada personally appearing, do acknowledge themselves, and each of them doth acknowledge himself to owe to A. N. B., Esq., master of the said court, the sum of———of lawful money of Canada to be paid to the said A. N. B. his executors administrators and assigns, and unless they do pay the same, they the said A. B., C. D. and E. F. are willing and do grant and each of them is willing and doth grant for himself, his heirs, executors and administrators, that the said sum of———shall be levied recovered and received of and from them and each of them wheresoever the same shall or may be found.

Witness the Honourable P. M. M. S. V., Chancellor of our said court at Toronto the———day of———in the twenty———year of Her Majesty's reign, and in the year of our Lord 186—.

WHEREAS by an order of the Court of Chancery for Upper Canada, made in a cause wherein———are plaintiffs and———defendants, and bearing date the———day of———. It was ordered that it should be referred to the master of this court to appoint a proper person to receive, (*or upon the above bounden A. B. first giving security to the satisfaction of the said master, he should be appointed receiver of*) the rents and profits of the real estate, and to collect and get in the outstanding personal estate of———in the said order named. AND WHEREAS the said master hath appointed and approved of the above bounden A. B. and C. D. and E. F., as sureties for the said A. B., and hath also approved of the above written recognizance with the underwritten condition as a proper

security to be entered into by the said A. B. and C. D. and E. F., pursuant to the said order and the general orders of the said court in that behalf, and in testimony of such approbation, hath signed an allowance in the margin hereof.

NOW THE CONDITION of the above written recognizance is such, that if the said A. B. do, and shall duly account for all and every, the sum and sums of money which he shall so receive on account of the rents and profits of the real estates and in respect of the personal estate of the said X. Y., and do and shall duly pay the balances which shall from time to time be certified to be due from him at such periods as may be directed.

Then the above recognizance shall be void and of none effect, otherwise the same is to be and remain in full force and virtue.

Taken and acknowledged at Osgoode Hall in the City of Toronto, this——day of——before me.

A. B. [L. S.]

C. D. [L. S.]

E. F. [L. S.]

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## 107. Receiver's Account.

## IN CHANCERY :

(Style of cause.)

The second account of A. B., the Receiver appointed in this cause by an order bearing date the \_\_\_\_\_ day of \_\_\_\_\_ to receive the rents and profits of the real estate, and to collect and get in the outstanding personal estate of the testator in this cause named, from the \_\_\_\_\_ day of \_\_\_\_\_, 1862, to the \_\_\_\_\_ day of \_\_\_\_\_, 1863.

## REAL ESTATE—RECEIPTS.

No. of Item.	Date when received.	TENANTS' NAMES.	PREMISES.	Annual Rent.	Arrears Due at _____	Amount Due at _____	Amount received.	Arrears remaining due.	REMARKS.
1	1862	John Doe.	Lot 13, 4th con. of Vaughan, County of York.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	£ s. d.	
2	"	Richard Roe.	House No. 120 Queen Street, Toronto.						

## PAYMENTS AND ALLOWANCES.

No. of Item.	Date when paid or allowed.	NAME OF PERSON.	FOR WHAT PURPOSE.	AMOUNT.
1	1863	John Smith.	Bill for repairs of house on Queen Street, Toronto, let to R. Roe.	£ s. d.
2	"	Liverpool Insurance Co.	One year's insurance of _____ due.	





108. *Condition of Recognizance by the guardian of the persons and property of male and female infants.*

*Recognizance and recital as in receiver's recognizance ante, mutatis mutandis.*

NOW THE CONDITION of this obligation is such, that if the above bounden A. B. do and shall according to the practice of the said court, as often as he shall be required, make a just and true account of the personal estate and the rents and profits of the real estate of the said G. F. and M. F., or of either of them as now are, or hereafter shall come to the hands, custody or possession of the said A. B., and which he may receive out of or concerning the said estate, and shall carefully observe, perform and keep the orders and directions of the said court touching or concerning the said G. F. and M. F., or either of them, or their, his or her estate, and touching all such moneys as shall remain due upon the foot of his account, duly taken by the said master, and shall be careful to see the houses, buildings and structures of the said G. F. and M. F., and of each of them to be well and sufficiently repaired, and so kept and maintained during the continuance of the said wardship, and shall carefully preserve and keep all the deeds, evidences and writings touching the lands and estate of them the said G. F. and M. F., or either of them as now are, or hereafter shall come to his hands, custody or possession, and shall provide for the persons of the said G. F. and M. F. and for their safety, and shall not sell or alienate his interest in the said custody or wardship, to any person or persons whomsoever without the order of this court having been first obtained in that behalf, and do and shall not permit or suffer the said G. F. or M. F., or either of them, during the said wardship to marry without the consent of the court, but shall in all things demean himself as a careful and faithful guardian of the person and estates respectively of them the said G. F. and M. F., then the above recognizance shall be void, &c.

109. *Form of endorsement of office copy bill.*

Your answer is to be filed at the office of the registrar, at Osgoode Hall, in the city of Toronto, (or, when the bill is filed in an outer county, at the office of the deputy-registrar at ———.)

You are to answer or demur within four weeks from the service hereof, (or, when the defendant is served out of the jurisdiction, within the time limited by the order authorising the service.)

If you fail to answer or demur within the time above limited, you are to be subject to have such decree or order made against you as

Amount of Receiver's costs in passing this account of personal estate .....  
Balance due from Receiver on account of personal estate .....

the court may think just, upon the plaintiff's own shewing; and, if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause.

NOTE.—This bill is filed by Messrs. A. B. and C. D., of the city of Toronto, in the county of York, solicitors for the above named plaintiff; (and, where the party who files the bill is agent, say, agents of Messrs. E. F. and G. H., of ———, solicitors for the above named plaintiff.)

110. *Endorsement on office copy Bill for foreclosure or sale.*

“NOTICE TO THE DEFENDANT WITHIN NAMED.

“Your answer is to be filed at the office of the ——— registrar, at ———, in the ——— of ———. You are to answer or demur within ——— weeks from the service hereof.

“If you fail to answer or demur within the time above limited, you are to be subject to have a decree or order made against you forthwith thereafter; and if this notice is served upon you personally, you will not be entitled to any further notice of the future proceedings in the cause.

“NOTE.—This bill is filed by ———, of ———, in the county of ———, solicitors for the above named plaintiff.

“And take notice, that the plaintiff claims that there is now due by you, for principal money and interest, the sum of ———, and that you are liable to be charged with this sum, with subsequent interest and costs, in and by the decree to be drawn up; and that in default of payment thereof within six calendar months from the time of drawing up the decree, your interest in the property may be foreclosed (or sold) unless, before the time allowed you as by this notice for answering, you file in the office above named, a memorandum in writing, signed by yourself or your solicitor to the following effect: ——— *dispute the amount claimed by the plaintiff in this cause*, in which case you will be notified of the time fixed for settling the amount due by you, at least four days before the time to be so fixed.”

111. *Endorsement on order directing publication of advertisement for absent defendant.*

C. D., take notice that if you do not answer or demur to the bill pursuant to the above order, the plaintiff may obtain an order to take the bill as confessed against you, and the court may grant the plaintiff such relief as he may be entitled to on his own shewing,

and you will not receive any further notice of the future proceedings in the cause.

112. *Endorsement on office copy decree.*

To Mr. ———, the person upon whom service has been directed.

(Set out the order.)

If you wish to apply to discharge the foregoing order, or to add to or vary the decree, you must do so within fourteen days from the service hereof. (When the order fixes a time for the further proceedings, add) And if you fail to attend at the time and place appointed, either in person or by your solicitor, such order will be made and proceedings taken in your absence, as the judge may think just and expedient; and you will be bound by the decree and the further proceedings in the cause in the same manner as if you had been originally made a party to the suit, without any further notice.

113. *Endorsement on answer.*

This answer is filed by Messrs. A. B. and C. D., of the city of Toronto, in the county of York, solicitors for the above named defendants, (and where the party who filed the answer is agent, say, agents of Messrs. E. F. and G. H., of ———, solicitors for the above named defendants.)

114. *Conditions of sale.*

1st. No person shall advance less than £2 at any bidding under £100, nor less than £5 at any bidding over £100; and no person shall retract his bidding.

2nd. The highest bidder shall be the purchaser; and if any dispute arise as to the last or highest bidder, the property shall be put up at a former bidding.

3rd. The parties to the suit, with the exception of the vendor, are to be at liberty to bid.

4th. The purchaser shall, at the time of sale, pay down a deposit in the proportion of £10 for every £100 of his purchase money to the vendor or his solicitors, and shall pay the remainder of the purchase money on the ——— day of ——— next; and upon such payment, the purchaser shall be entitled to the conveyance, and to be let into possession ———: the purchaser, at the time of such sale, to sign an agreement for the completion of the purchase.

5th. The purchaser shall have the conveyance prepared at his own expense, and tender the same for execution.

6th. If the purchaser shall fail to comply with the conditions aforesaid, or any of them, the deposit and all other payments made thereon shall be forfeited, and the premises may be re-sold, and the deficiency, if any, by such re-sale, together with all charges attending the same or occasioned by the defaulter, shall be made good by the defaulter.

[These are the standing conditions provided by the Court: but they are subject to modification when settling the conditions of sale before the master, upon sufficient reason therefor being shewn.]

115. *Decree directing accounts.*

The court doth order that the following accounts and enquiries be taken and made, that is to say :

1st. An account of the personal estate not specifically bequeathed of A. B. deceased, the testator in the pleadings mentioned, come to the hand of, &c.

2nd. An account of the said testator's debts.

3rd. An account of the said testator's funeral expenses.

4th. An account of the said testator's legacies.

5th. An enquiry, what parts, if any, of the said testator's personal estate are outstanding or undisposed of.

And it is ordered that the said testator's personal estate, not specifically bequeathed, be applied in payment of his debts and funeral expenses in a due course of administration, and then, in payment of his legacies.

And it is ordered that the following further accounts and enquiries be taken and made, that is to say :

6th. An enquiry what real estate the said testator was seized of or entitled to at the time of his death.

7th. An enquiry what incumbrances affect the testator's real estate.

8th. An account of the rents and profits of the said testator's real estate received by, &c.

And it is ordered that the said testator's real estate be sold. And it is ordered that the further consideration of this case be adjourned, and any of the parties are to be at liberty to apply.

116. *Acceptance of service of bill by solicitor.*

(*Full style of cause.*)

In Chancery.

I hereby accept service of an office copy of the bill of complaint in this cause, with the usual notices for ——— endorsed thereon as

solicitor for the defendant A. B., and I undertake to answer or demur thereto, within the time limited in the said endorsement, or in default of my so doing that the plaintiff may proceed to take the bill *pro confesso*, (or obtain a decree) against the said A. B. without further notice.

Dated, &c.

C. D.,

Solicitor for A. B.

117. *Acceptance by solicitor for party added in master's office.*

I hereby accept service for \_\_\_\_\_ as his solicitor, of an office copy of the decree in this cause, the master's notice A. endorsed thereon, and the master's appointment returnable on the \_\_\_\_\_ day of \_\_\_\_\_.

Dated, &c.

118. *Advertisement for creditors.*

Chancery notice to creditors.

(*Style of cause.*)

In Chancery.

Pursuant to the decree of the Court of Chancery for Upper Canada, made in this cause, the creditors of S. T. late of the Township of \_\_\_\_\_, in the county of \_\_\_\_\_, farmer, deceased, (who departed this life on the \_\_\_\_\_, day of \_\_\_\_\_,) are on or before 10 of the clock in the forenoon of \_\_\_\_\_ the \_\_\_\_\_ day of \_\_\_\_\_ next \_\_\_\_\_, to come in before the undersigned master in ordinary of the said court, at my chambers in Osgoode Hall, in the City of Toronto, and prove their debts, or in default thereof they will be excluded the benefit of the said decree.

Dated, &c.

119. *Advertisement on Sale.*

Chancery sale.

In Chancery.

A. B., Plaintiff.

and

C. D. and E. F. (by bill) and others  
(made parties in the master's office,  
Defendants.

In pursuance of the decree bearing date the \_\_\_\_\_ day of \_\_\_\_\_, in this cause, will be sold by public auction by A. B. at \_\_\_\_\_, in the Town of \_\_\_\_\_, with the approbation of W. L., master of this court, at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_ next at \_\_\_\_\_ noon, the following property.

Lot No. 1.

Lot No. 2 \_\_\_\_\_

Correct descriptions of the property, stating in each case the nature of the premises, whether wild land or otherwise.

State whether lands sold subject to any incumbrance, whether title deeds will be produced, or any point in which the conditions of sale differs from the standing conditions of the court.

(In other respects) the conditions of sale are the standing conditions of the Court of Chancery. Particulars may be had at the offices of the master, &c.

120. *Bank manager's certificate of non-payment of money.*

(*Style of cause.*)

In Chancery.

I \_\_\_\_\_, manager of the branch (or agency) of the bank of \_\_\_\_\_, at \_\_\_\_\_, do hereby certify that no sum of money was on the \_\_\_\_\_ day of \_\_\_\_\_, or before or since that day paid into this bank to the joint credit of \_\_\_\_\_, and of the registrar of this court, or to the credit of the said \_\_\_\_\_ alone, by \_\_\_\_\_ or by one one on his behalf.

Dated, &c.

Affidavits of the witness and the plaintiff to support the certificate given *ante*.

121. *Account for master's office, on mortgage debt in ordinary cases, supposing payments have been made, and account taken, 1st Oct. 1862.*

(*Style of cause.*)

In Chancery.

A.

This is the account marked A. referred to in the affidavit of \_\_\_\_\_, sworn the \_\_\_\_\_ day of \_\_\_\_\_, before me, G. H., a commissioner, &c.

1860.

Jan. 1.	Principal money.....	£200 00 0
	Interest on £200 from 1st Jan.,	
	1860, to 1st July, 1861, at 6 per	
	cent.....	£17 19 0
"	Received on account.....	10 00 0

1862.

Feb. 21.	Interest on £200 from 1st July,	
	1861, to 1st Feb. 1862.....	£ 7 1 4
"	Received on account.....	85 00 4-150 00 0

1862.

Oct. 1.	Interest on £150 from 1st Feb., 1862, to 1st Oct. 1862 .....	£ 5 19 4
	Costs (item filled up by master after taxation,) say .....	12 10 0
	Interest on £150 from 1st Oct., 1862, to 1st April, 1863, 6 calendar months .....	4 10 0
		<hr/> £172 19 4

## XII.—BILLS OF COSTS.

122. *Plaintiff's costs of pro confesso mortgage suit, no parties added in the master's office.*

Instructions 10s; Letter to defendant 2s 6d.	£ 12 6
Drafting bill, 20s.	1 0 0
Attending counsel with and for, 2s. 6d paid, fee 10s.	12 6
Engrossing bill 15 folios, 7s. 6d.	7 6
Attending filing, 1s. 3d, paid 15s.	16 3
Engrossing office copy, 6s. 3d.	6 3
Attending examining 1s 3d, paid 3s. 9d.	5 0
Attending for certificate, 1s 3d, paid 1s. 3d.	2 6
Endorsement on office copy, 4s.	4 0
Affidavit of service, 2s.	2 0
Attending to stamp, 1s. 3d.	1 3
Attending sheriff with, 1s. 3d.	1 3
Paid sheriff's fees on service, 9s. 9d.	9 9
Attending to search if answer filed, 1s. 3d.	1 3
Paid 1s.	1 0
Attending to bespeak decree, 1s. 3d.	1 3
Attending for, 1s. 3d.; paid 16s.; fee 5s.	1 2 3
Attending to bespeak registrar's certificate, 1s. 3d.	1 3
Attending for, 1s. 3d.; paid 16s.	16 3
Attending to bespeak sheriff's certificate, 1s. 3d.	1 3
Attending for, 1s. 3d.; paid 3s. 9d.	5 0
Copy decree for master, 8s.	8 0
Attending consideration, 5s.; and for warrant,	5 0
Copy warrant for defendant, 6d.	6
Attending to serve, 1s. 3d: affidavit, 2s.; oath, 1s.	4 3
Drawing plaintiff's affidavit, 6 fols. 6s.	6 0
Engrossing, 3s.	3 0
Drawing account 2s.; copy 1s.	3 0
Attending to have affidavit sworn, 1s. 3d.	1 3
Paid commissioner and marking exhibit, 2s 6d.	2 6
Attending to hear and determine, 5s.	5 0



Attending to settle report, 5s.	5	0
Attending for report, 1s. 3d.; paid £1 10s. 3.	1	11 6
Copy 6 fol. 8s.; attending to file original, 1s. 3d.	4	3
Paid 4d.		4
Plaintiff's affidavit of non-payment, 3 folios, 3s.	3	0
Attending to swear, 1s. 3d.; paid 1s. 3d.	2	6
Bank Manager's certificate, 2s.	2	0
Attending execution, 1s. 3d.; affidavit of, 1s. 3d.	2	6
Execution 2 fol. 1s.; oath 1s. 2d.	2	2
Attending to move for final order, 5s.	5	0
Attending registrar, 1s. 3d.; attending for, 1s. 3d.; paid 3s. 4.	5	10
Fee on, 5s.; attending to bespeak, 5s.	10	0
Certificate, 1s. 3d.; paid 5s.	6	3
	£13	0 1

In cases where the registrar of deed's certificate would be unnecessarily long and expensive, the master will receive an abstract prepared by the solicitor, accompanied by his affidavit, stating the probable length and expense of the registrar's abstract, the unnecessary nature of a great part of its contents, that he has searched in the registrar's books, and the abstract exhibited to him contains a full and true statement of all the entries affecting the lot in question.

In chancery only one bill of costs is allowed, this is filed on obtaining the warrant to tax, the opposite party inspects the copy filed, or if he desires a copy obtains it from the master.

A commissioner is entitled to 1s. for every oath, 1d. per folio for reading over every affidavit except answers, and 1s. for every exhibit marked.

On going into the master's office the plaintiff brings in the decree and copy, registrar of deeds abstract, and the sheriff's certificate as to writs of execution in his hands. The master compares the copy with the decree and files the former. If, as is assumed in the above bill, there are no subsequent incumbrances or writs of execution in the sheriff's hands, the master issues his warrant, "to hear and determine, tax costs and settle report," which is served on the defendant. On the return day the plaintiff's solicitor brings in the plaintiff's affidavit, page 301, his account, page 330, and bill of costs. The master finds what is due on the mortgage at that date, computes interest for six calendar months in advance, taxes the plaintiff's costs as far as the line, adds the sums of money together, and in his report, appoints the defendant to pay the amount at some bank fixed by the plaintiff, and approved by him according to order LXXIV. page 206. On default the plaintiff makes his affidavit, p. 309, on production of which, the bank manager's certificate p. 330, with affidavit of execution p. 309 annexed, decree and copy of the master's report, (the original having been filed and confirmed under order LXXIX. p. 210,) in chambers, the final order is granted.

It ought to be noted that in foreclosure suits, an abstract of incumbrances

*subsequent* to the plaintiff's mortgage is only required, but in those for a sale the master enquires as to *all* incumbrances affecting the property.

After an order for sale is obtained the plaintiff brings in his draft advertisement, for outline see form on page 329, takes out a warrant to settle advertisement and proceeds according to the directions fully laid down in the orders regarding sale. After sale the vendor obtains the master's warrant "to settle report on sale," and on the return brings in affidavit of publication, p. 307, an affidavit of duly sticking up posters where they have been ordered, the auctioneer's affidavit, p. 307, and an affidavit of the signature by the purchaser of the contract, p. 212. The master's report is filed and confirmed in the usual way. If the purchaser demands it, an abstract has to be furnished. It would overstep the limits of this work to attempt to give anything like a clear idea of the contents of the abstract and requisitions, the author feels that any short statement would only mislead and would refer to Sugden & Dart's works on vendors and purchasers.

After the report is confirmed the vendor moves upon notice to the purchaser as well as the parties to the suit, to have the purchase money paid out of court, page 315.

If default is made in payment by purchaser, the vendor moves for re-sale—page 315.

In the following bills the charges are not carried out, as a great many of the items depend upon the length of the pleading, and are only given as specimens of the proper charges in such a suit.

**123. Plaintiff's costs, bill pro confesso against two defendants, and parties added in master's office.**

Instructions 10s.; letters of notice, 5s.

Draft bill, 20s.; attending counsel with and for, 2s. 6d.; paid 10s.

Copy to file 24 fols. 12s.

Attending to file, 1s. 3d.; paid 15s.

2 copies to serve, 20s.

Attending examining, 1s. 3d.; paid 4s.

Attending for two certificates, 1s. 3d.; paid 7s. 6d.

2 common endorsements, 4s.

Attending to serve A. 1s. 3d.; affidavit 2s.

Attending to stamp, 1s. 3d.; oath, 1s.

Affidavit for B. 2s.; letters to sheriff Wentworth with, 2s. 6d.; post 1s. 6d.

Received letter from sheriff post, 4d.

Fees 9s. 9d.; post and registration of letters with, 4d.

Attending to bespeak and for order *pro con* against A., 2s. 6d.; paid 3s. 4d.

Attending to bespeak and for order *pro con* against B., 2s. 6d.; paid 3s. 4d.

Precipe and attending to set down, 1s. 3d.; paid 2s. 6d.

Instructions for brief, 5s.; brief 24 fols. 12s.

Attending counsel with and for, 2s. 6d.; paid fee 50s.

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Attending registrar, 1s. 3d.  
 Attending for decree, 1s. 3d.  
 Paid 14s. ; fee 5s.  
 Copy decree for master, 6 fols. 2s.  
 Attending to bespeak abstract from registrar of deeds, 1s. 3d.  
 Attending for, 1s. 3d., paid.  
 Attending to bespeak and for sheriff's certificate, 2s. 6d., paid.  
 Attending consideration, 5s.  
 Copy warrant for A. 6d. ; attending to serve, 1s. 3d.  
 Affidavit, 2s. ; oath, 1s.  
 Copy decree for each party added in M. O. 6 fols. 2s. 6d. each.  
 Attending to make office copies, 1s. 3d. ; paid 6d. each.  
 Copy notice B. 2s. 6d.  
 Copy notice A. for parties added in M. O. 2s. 6d. each.  
 Attending to serve, 1s. 3d. (if acceptance refused.)  
 (Attending to search record as to attorney, 1s. 3d.)  
 Attending to serve, 1s. 3d. ; affidavit 3 fols. 3s.  
 Attending to swear, 1s. 3d. ; paid 1s. 3d.)  
 Draft affidavit of plaintiff, 6 fols. copy 3s.  
 Account, 2s. ; copy, 1s.  
 Attending to swear affidavit, 1s. 3d. ; paid and marking exhibit, 2s. 6d.  
 Bill of costs, 5s.  
 Attending to hear and determine (according to length of time occupied.)  
 Attending to settle report, 5s.  
 Attending for, 1s. 3d.  
 Paid master's fees.

*124. Costs on further directions in ordinary cases.*

Copy report fols., attending to file, 1s. 3d. ; paid 4d.  
 Attending to set down for hearing on Fur. Dir. 1s. 3d. ; paid 2s. 6d.  
 Notice of hearing, 1s. ; copies each, 6d.  
 Attending to serve, 1s. 3d.,  
 Instructions for brief, 5s.  
 Brief (to consist of copies of decree and master's report, and notice of hearing) 6d. per folio.  
 Attending counsel with and for, 2s. 6d.  
 Paid fee.  
 Attending registrar, 1s. 3d.  
 Attending for appointment to settle minutes, 1s. 3d. ; copy 6d. each  
 Attending to serve, 1s. 3d.  
 Attending to settle, 5s.  
 Attending for appointment to pass decree, 1s. 3d.  
 Copy 6d. each, attending to serve, 1s. 3d.  
 Attending to pass, 5s.  
 Attending for decree, 1s. 3d., paid.  
 Fee on, 5s. ; copy for master

Attending to file and for warrant, 1s. 3d.

Copies of warrant, 6d. each.

Attending to serve, 1s. 3d.

Affidavit of plaintiff, 8s. ; copy 1s. 6d.

Bill of costs, 5s.

Attending to take account, 5s.

Attending to settle report, 5s.

Paid master's fees.

Copy report fols. attending to file, 1s. 3d. ; paid 4d.

It will be observed in these bills 5d. per folio only is charged for those pleadings, &c. made office copies by the Registrar, 1d. a folio being paid him.

The plaintiff's solicitor has the option of either serving the judgment creditors personally or the attorney on the record. Where the attorney refuses to accept as solicitor, and it is inconvenient to serve the judgment creditor, the plaintiff's solicitor searches the original roll and satisfies himself as to what attorney recovered the judgment, he then serves him and makes an affidavit of the search and the service.

In simple cases the plaintiff's affidavit is merely, that since the swearing his last affidavit he has received no money, and has not been in possession. very similar to the one for a final order, page 309.

#### 125. *Plaintiff's Costs against Mother & Infant.—Motion for Decree.*

Instruction to file bill, 10s. Letters to defendants, 2s. 6d.

Draft bill, 20s. ; attending counsel, 2s. 6d. ; fee to counsel, 10s.

Engrossing 12 fols., 6s. ; 2 copies for defendants, 12s.

Attending filing bill, 1s. 3d. : paid 15s. ; 2 fols. each, 4s.

Draft notice of motion to appoint guardian for infant, 2 fols. 2s.

Engrossing, 1s. ; 2 copies 2s.

Draft affidavit of plaintiff as to infancy, 8 fols. 3s.

Engrossing, 1s. 6d.

Affidavit of service of notice of motion, 2s.

Attending to swear, 1s. 3d. ; oath, 1s.

Affidavit of service of office copy bill, 2s.

Attending to stamp, 1s. 3d.

Attending sheriff with office copy bill, 2s.

Attending return of affidavit of service of office copy of bill, 1s. 3d.

Sheriff's fees, 14s. 9d.

Sheriff's fees for notice of motion, 5s.

Fee on motion to appoint guardian, 10s.

Attending registrar, 1s. 3d.

Attending for order, 1s. 3d. ; paid 3s. 3d. ; fee 5s.

Copy and service, 2s. 3d.

Having received notice of filing infant's answer, demand copy and service, 2s. 9d.

Attending to search for answer of mother, 1s. 3d.; paid 1s.  
 Attending for order pro confesso, 1s. 3d.; paid 8s. 4d.; fee 5s.  
 Draft affidavit of H— 3 fols. 3s.; engrossing, 1s. 6d.  
 Attending to swear, 1s. 3d.; oath and exhibit, 2s.  
 Draft affidavit of S— 3 fols. 3s.; engrossing, 2s.  
 Draft affidavit of plaintiff, 4 fols. 4s.; engrossing 2s.  
 Attending to swear, 1s. 3d.; oath, 1s.  
 Instructions for brief, 5s.  
 Brief, 23 fols. 11s. 6d.  
 Attending setting down, 1s. 3d.; paid 10s.  
 Attending filing 8 affidavits, 1s. 3d.; paid 1s.  
 Notice of motion for decree copy and service, 2s. 9d.  
 Having received demand of affidavit filed copy of plaintiff's affidavit, 2s.  
 Copy of affidavit, 1s. 6d.  
 Copy of affidavit, 1s. 6d.; attending serving, 1s. 3d.  
 Attending counsel, 1s. 3d.  
 Fee on hearing, 70s.; attending registrar, 1s. 3d.  
 Draft minutes, 2s.  
 Notice to settle copy and service, 2s. 9d.  
 Attending settling minutes, 5s.  
 Attending for appointment to pass, 1s. 3d.  
 Copy, 6d.; attending to serve, 1s. 3d.  
 Attending passing decree, 5s.  
 Attending for decree, 1s. 3d.; paid 14s.; fee, 5s.  
 Attending bes. certificate of incumbrances, 1s. 3d.  
 Attending for, 1s. 3d.; paid 8s. 9d.  
 Attending sheriff bes. certificate of writs, 1s. 3d.  
 Paid for certificate of writs as to mother, 8s. 6d.  
 Attending for, 1s. 3d.; paid 3s.  
 Copy of decree for master, 2s. 6d.  
 Attending considering, 5s.  
 Attending for warrant, 1s. 3d.  
 Copy and service of warrant 1s. 9d.  
 Attending hearing and determining, 5s.  
 Attending settling report, 5s.  
 Attending for report, 1s. 3d.  
 Taxing infant's costs, 5s.  
 Bill of costs, 5s.  
 Paid master's fees, £1 12s. 11d.  
 Paid infant's costs.

**126. Plaintiff's costs for not proceeding to examination and hearing.**

Attending to set down 1s. 3d.; paid.  
 Notice of examination and hearing, copy and service 2s. 9d.  
 Attending for subpoena 1s. 3d.; paid 5s.  
 Copies 1s. each.

Instructions for brief 5s. ; brief — fol.  
 Attending counsel with 1s. 3d. ; paid his fee.  
 Paid witness fees.  
 Attending for order to tax costs 1s. 3d.  
 Paid 3s. : fee on 5s.  
 Copy for master 1s.  
 Bill of costs 5s.  
 Copy warrant 6d. ; attending to serve 1s. 3d.  
 Attending to bes. certificate 1s. 3d.  
 Paid master.

127. *Costs of the day at a hearing or a court motion are, in ordinary cases, £2 10s.*

The writ of subpœna has been decided by the taxing officers, to stand on a different footing to the other writs and orders of court, and they refuse to tax a fee on them to the solicitor, notwithstanding the order. The court seems to countenance this view, by allowing the sheriff a fee of 2s. 6d. on the return of all process and writs, except subpœnas.

128. *Defendant's costs.—Bill dismissed for want of prosecution.*

Instructions, 10s. ; draft answer, 15 fols. 15s.  
 Attending counsel with and for, 2s. 6d. ; paid 10s.  
 Engrossing answer, 7s. 6d. ; attending defendant, reading over 5s.  
 Attending to swear, 1s. 3d.  
 Paid 1s. ; attending to file, 1s. 3d. ; paid 3s.  
 Notice of filing copy and service, 2s. 9d.  
 Having received demand, copy answer, 6s. 3d.  
 Attending to make office copy, 1s. 3d. ; paid 1s. 3d.  
 Attending to serve, 1s. 3d.  
 Draft notice of motion to dismiss, 2s.  
 Copy, 1s. ; attending to serve, 1s. 3d.  
 Attending to bespeak and for certificate, 2s. 6d. ; paid 2s. 6d.  
 Attending in chambers, 5s. ; attending registrar, 1s. 3d.  
 Attending for order, 1s. 3d. ; paid 1s. 6d. ; fee, 5s.  
 Copy for master, 6d.  
 Bill of costs, 5s.  
 Attending for appointment, 1s. 3d. ; paid 1s. 3d. ; copy, 6d.  
 Attending to serve, 1s. 3d.  
 Paid master, 9s. 5d.  
 Attending to bespeak and for certificate, 1s. 3d.

129. *Infant defendant's costs.*

Instructions 10s.  
 Having received order appointing guardian, demand of office copy bill copy and service, 2s. 9d.  
 Letter to infants mother 2s. 6d.

Drawing answer 3s.  
Attending counsel 2s. 6d.; fee 10s.  
Engrossing answer 1s. 6d.  
Drawing consent to file without oath or signature, 1s.; Atg. 1s. 3d.  
Attending filing 1s. 3d.; paid 3s.  
Notice of filing copy and service, 2s. 9d.  
Engrossing office copy 1s. 4d.  
Attending examining 1s. 3d.; paid 2d.; serving 1s. 3d.  
Having received notice of motion for decree, attending to search if affidavits filed 1s. 3d.; paid 1s.  
Instructions for brief 5s.  
Brief 9s.  
Copy of affidavits 6d.  
Attending counsel with brief 1s. 3d.; fee 50s.  
Attending settling minutes 5s.  
Attending passing decree 5s.  
Attending at masters office hearing and determining, 5s.  
Attending on taxation of plaintiffs costs 5s.  
Attending settling report 5s.  
Bill of costs 5s.  
Paid masters fee 5s. 4d.

130. *Defendant's costs, bill dismissed at the hearing.*

Instructions 10s.  
Drawing answer 18 folios 18s.  
Attending counsel with and for 2s. 6d.  
Paid his fee 10s.  
Attending defendant reading over answer 5s.  
Engrossing answer 9s.  
Attending to have sworn 1s. 3d.; paid 1s.  
Notice of filing copy and service 2s. 9d.  
Having received demand, copy 7s. 6d.  
Attending to make office copy 1s. 3d.; Paid 1s. 6d.  
Attending to serve 1s. 3d.  
Having received order to produce, drawing affidavit on production and schedule 6 folio 6s.; Engrossing 3s.  
Attending when sworn 1s. 3d.; Paid 1s. 6d.  
Attending to file 1s. 3d.; Paid 4d.  
Having received demand office copy affidavit, making same 2s. 6d.;  
Attending examining 1s. 3d.; paid 6d.; attending to serve 1s. 3d.  
Having received office copy amended bill perusing and considering amendments 5s.  
Drawing further answer 6 folio 6s.  
Attending counsel with and for 2s. 6d.; paid 10s.  
Attending defendant reading over, 5s.; engrossing 3s.; attending when sworn 1s. 3d.; paid 1s. 6d.



Attending to file 1s. 3d.; paid 3s.  
 Having received demand, drawing copy 2s. 6d.  
 Attending to examine 1s. 3d.; paid 6d.  
 Attending to serve 1s. 3d.  
 Attending to bespeak and for order to produce 2s. 6d.  
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 Attending to serve 1s. 3d.  
 After production, notice of examining papers, copy and service 2s. 9a.  
 Attending examining 5s.  
 Attending counsel with and for papers, to advise on evidence 2s. 6d.  
 Paid fee 25s.  
 Attending; for subpoena 1s. 3.  
 Paid 5s.  
 Copy 2s.; attending to serve 1s. 3d.  
 Instructions for brief 5s.  
 Brief for 1st counsel 30 folio 15s.  
 Brief for 2nd counsel 15s.  
 Attending senior counsel with brief 1s. 3d.  
 Paid his fee.  
 Attending junior counsel with brief 1s. 3d; paid his fee  
 Attending registrar with exhibits 1s. 3d.  
 Schedule of 2 folios 1s.; copy 6d.  
 Attending for judgment 5s.  
 Attending registrar for exhibits 1s. 3d.  
 Attending for appointment to settle minutes 1s. 3d.  
 Copy 6d.; attending to serve 1s. 3d.  
 Attending for appointment to pass decree 1s. 3d,  
 Copy 6d.; attending to serve 1s. 3d.  
 Attending to pass 5s.  
 Attending for decree 1s. 3d. paid.  
 Fee on 5s.; copy decree, folios —  
 Bill of costs 5s.  
 Attending for warrant 1s. 3d.; copy 6d.  
 Attending to serve 1s. 3d.  
 Paid witness fees.  
 Paid master's fees.  
 Attending for certificate of taxation 1s. 3d.

*131. Costs of proving claim in master's office by party added.*

Instructions 10s.  
 Draft affidavit of defendant 5 folios 5s.  
 Copy 2s. 3d.  
 Draft account and copy 3s.  
 Attending to swear 1s. 3d.  
 Paid and marking exhibits 2s. 5d.  
 Bill of costs 5s.

Attending in master's office hearing and determining, 5s.  
Attending to settle report 5s.  
Paid master's fees

The Registrar has strictly, no right to allow a party to examine the papers produced by the opposite side, unless he produces a notice of his intention to examine such papers at that hour with admission or affidavit of service.

It is deemed unnecessary to furnish to the practitioner further forms of bills of cost. A glance at the foregoing forms will show that many of the items are mere repetition. But it is to be noticed that while the skeleton of each bill is the same, almost every charge varies according as the suits vary. In Common Law the prescribed tariff covers almost every case and printed forms of bills framed therefrom, are consequently in common use. In Chancery, however, every pleading depends for its length on the facts of the case, hence only the constantly recurring items can be noted in a form of a bill of costs to the exclusion of the special charges of the suit which constitute the larger part of the bill.

Nor has any attempt been made to give a form of bill between solicitor and client; to the tyro such a form, if given, would be no guide to the principle of the charges, he would only see some of the same items as in other bills repeated a little oftener.

The judges have decided that bills between solicitor and client are to exceed as little as possible those between party and party; a retainer is to be taxed when actually paid, counsel fees of the same amount as paid, and necessary letters and disbursements untaxable between parties.

Costs between solicitor and client are allowed in infancy and lunacy matters, administration and partition suits, to next friends when the proceedings are proper, and in cases where extraordinary circumstances warrant in the opinion of the court, such adjudication of costs.

In alimony suits, the wife gets her costs between solicitor and client and that *de die in diem* upon application therefor, and the guardian *ad litem* assigned to infant defendants always receives his costs.

Costs are disallowed, in the discretion of the court, where there appears to be fair grounds for litigation on both sides, and the merits of the case are doubtful; also in cases where the court considers one party entitled to succeed, but is yet constrained owing to some technical rule to give judgment against him.

No costs will be allowed to the plaintiff even when successful if he has charged, and failed to prove *fi. ad.*

While these pages are passing through the press, two bills are before the Legislature, one or the other, or perhaps, both of which will in all probability materially effect the subject of costs, and this fact affords a reason for withholding a larger supply of forms in this place. The design of the bill introduced by Solicitor General Wilson, is to make all court fees pay-

able in stamps and to readjust the tariff by a slight increase of the fees, so that it may conform to the decimal system of the currency.

Mr. Scatcherd's bill aims at a general reduction of all counsel fees and attorney's and solicitor's charges with a proportionate lowering of the fees payable to the different courts. As matters stand, disbursements in chancery are twice as heavy, the amount of charges allowed by tariff one-half less, and the returns from clients as much more slowly realized, as suits in Equity are, of necessity, less expeditiously determined, than actions in Common Law Courts.

But the mere loss of fees is the least evil ; too cheap law is one of the greatest curses that can afflict a country, and all experience shows the wisdom of that maxim which hitherto has been the foundation of our system of jurisprudence.

" Interest republicæ ut sit finis litium."

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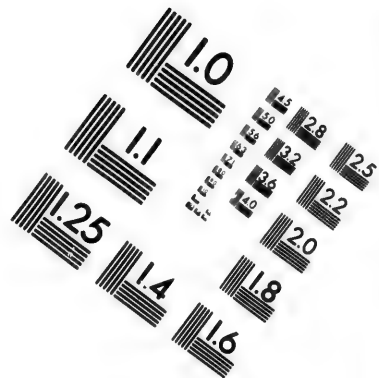
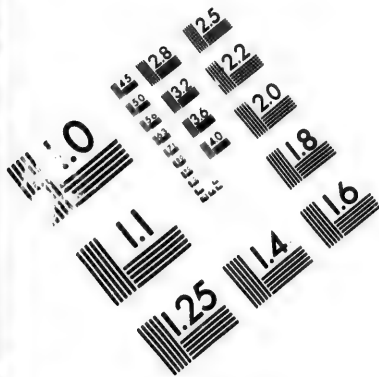
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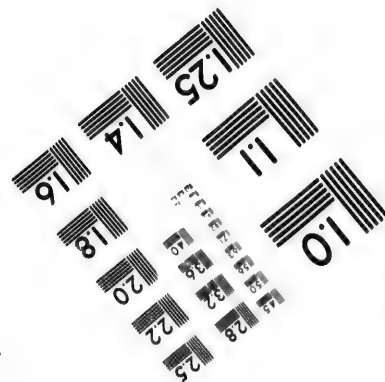
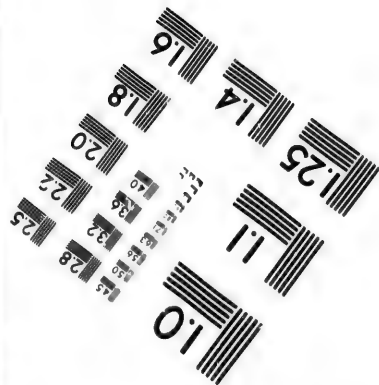
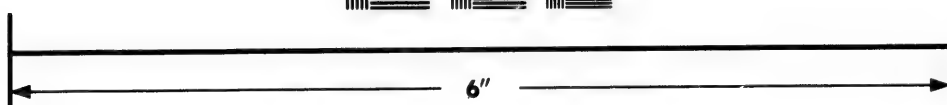
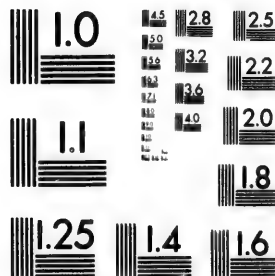
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